83-3

No. .

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

SUSANNA M. BAGINSKY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

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Questions Presented.

1. Whether the United States Court of Appeals for the Federal Circuit erred in failing to apply the "clearly erroneous" standard mandated by Claims Court Rule 52(a) in setting aside a crucial fact finding and in reversing a judgment in petitioner's favor in the United States Claims Court?

2. Whether the United States Court of Appeals for the Federal Circuit erred in making fact findings on issues which the Claims Court did not consider and in failing to remand petitioner's case to the Claims Court for further findings after the Court of Appeals determined that the Claims Court applied the wrong legal standard?

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STATUTES.

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Opinions Below.

The opinion of the United States Court of Appeals for the Federal Circuit is reported at *Baginsky* v. *United States*, 697 F.2d 1070 (Fed. Cir. 1983), and appears at A. 1a. The March 5, 1982 opinion of the Trial Division of the United States Court of Claims is unreported and appears at A. 19a. The opinion of a three judge panel of the United States Court of Claims is reported at 221 Ct. Cl. 908 (1979), and appears at A. 77a.

Grounds of Jurisdiction.

The order of the United States Court of Appeals for the Federal Circuit, reversing the judgment of the United States Claims Court in petitioner's favor, was rendered on January 10, 1983. On February 4, 1983, the United States Court of Appeals for the Federal Circuit denied the petitioner's petition for rehearing and suggestion for rehearing *en banc* (A. 84a). On May 9, 1983, the United States Supreme Court (Burger, C.J.), extended the time for filing a petition for writ of *certiorari* to and including July 4, 1983. This Court has jurisdiction to review the judgment below pursuant to 18 U.S.C. § 1254(a).

Rule which the Case Involves.

Rule 52(a) of the Claims Court Rules provides:

> *Findings by the Court.*
>
> *Effect.* In all actions tried upon the facts the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unneces-

sary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Statement of the Case.

Proceedings Below.

The petitioner, Susanna M. Baginsky, is a physician who is board certified as a pathologist. She was the Chief of Laboratory Services at the Brockton, Massachusetts Veterans Administration Hospital from April 15, 1973 until her removal from that position on May 19, 1975 (A. 50a).

This action alleges that she was wrongfully removed from that position, and seeks reinstatement, back pay and related relief. The action was originally brought in the United States District Court and was subsequently transferred to the United States Court of Claims. The Court of Claims properly had jurisdiction over the action pursuant to 28 U.S.C. § 1491(a)(1) (A. 7a).

Count one of her amended petition (A. 89a) in the Court of Claims alleges that the Veterans Administration violated its regulations in connection with an annual proficiency report prepared on April 15, 1974, about her performance in the first year on the job. The regulations required that Dr. Baginsky be shown a copy of the report. Because she received a marginal rating in that report, the regulations also required that her supervisor review the report with her and that she be counseled with respect to her strengths and weaknesses. The regulations are designed to help physicians improve their performance and hence avoid dismissal during their probationary period. Count two of the amended petition alleges that the Veterans Administration violated Dr. Baginsky's constitutional right to due process because the Review Board which

recommended her discharge considered allegations of which Dr. Baginsky had not been informed and reviewed documents which had not been furnished to her.

Prior to trial, a three judge panel of the Court of Claims denied the defendant's motions to dismiss and for summary judgment on counts one and two. The panel remanded the case for trial before a single judge of the trial division of that court (A. 77a).

The trial court decided to try count one alone, since that was likely to be much shorter and simpler than the more complicated inquiry which the constitutional issues would require (A. 87a). After a two day trial, the trial court found that the Veterans Administration had not followed the regulations "in any material respect." (A. 49a.) Because the three judge panel had found there to be a causal link between the failure to follow the regulations (if proven) and the 1975 termination, and because the trial court found the allegations to be proven, judgment entered for Dr. Baginsky (A. 75a-77a).

By a divided vote of two to one, the United States Court of Appeals for the Federal Circuit reversed (A. 1a). It held that the trial court had limited its review of the counseling issue too narrowly, and should have considered the events between the April 1974 report and the discharge in May 1975. Instead of remanding to the Claims Court for further findings on the new issues, the Court of Appeals reviewed the record and made fact findings on the new issues. It set aside the trial court's finding that the 1974 regulatory violations tainted the 1975 discharge. The court held that Dr. Baginsky could not recover on count one, and remanded the trial court for trial of count two. The dissenting judge protested that the majority usurped the trial court's fact finding function, and that the Court of Appeals should remand for further factual and legal findings in the Claims Court (A. 16a).

Facts.

Dr. Susanna Baginsky is an experienced physician specializing in pathology. She was appointed to the position of Chief of Laboratory Services at the Brockton Veterans Administration Hospital and began work on April 15, 1973. The position had been vacant for some time and the laboratory had experienced great difficulty prior to her arrival. Unless substantial improvements were made, the hospital's Chief of Staff feared that the laboratory might lose its accreditation. Several key employees were considering retirement. The laboratory staff was divided into feuding groups and some members were not on speaking terms with other members of the staff (A. 56a).

Dr. Baginsky's problems began before she was hired. The Chief of Staff, Dr. John Conlin, had doubts about Dr. Baginsky after his interview with her. Nevertheless, Dr. Conlin selected her. Dr. Conlin blamed Dr. Baginsky for the subsequent retirement of several key employees. Dr. Conlin was concerned about criticism of Dr. Baginsky by the Personnel Service for being tardy with certain paperwork (A. 57a-58a).

In late 1973 an incident took place over the hiring of a microbiologist for the laboratory. Dr. Baginsky recommended that one of the applicants be hired but because of a shortage of funds was unable to interview him face to face. The applicant was interviewed briefly by telephone and in person by a Veterans Administration employee in the applicant's home city. He was hired. A day after his arrival, Dr. Baginsky recommended that he be discharged because of his inability to perform basic tests in the laboratory. The microbiologist position was a critical one. The trial judge credited Dr. Baginsky's testimony that the applicant's shortcomings caused two deaths at the Brockton hospital. Subsequent investigation revealed that the applicant had misrepresented his credentials. Despite Dr. Baginsky's urgings, her supervisors did not discharge the

new employee for several weeks (A. 60a-61a). Dr. Baginsky's supervisor blamed her for the entire incident because he felt that she should have investigated the man's qualifications prior to hiring. The trial court found that Dr. Baginsky shared hiring responsibilities with the Personnel Service and the United States Civil Service Commission. Further it found that Dr. Baginsky was never informed that she alone was responsible for checking the applicant's credentials (A. 62a).

Dr. Baginsky's efforts to upgrade the laboratory created other tensions. The Chief of Staff testified that a number of the technicians in the laboratory feared that Dr. Baginsky wanted to replace them with technologists, who had more formal training (A. 56a-57a).

The trial court reviewed the evidence of these and other incidents in Dr. Baginsky's first year at the hospital. The court found that some mention of the perceived shortcomings took place but that there was never full discussion with plaintiff of these problems (A. 59a). The court went on to find that "there is no evidence that between October 23, 1973 and March 28, 1974, he [Dr. Conlin] or anyone else in authority at the hospital had any extended discussion with plaintiff." (A. 60a.) The court concluded that Dr. Conlin failed to convey the seriousness of his concerns to Dr. Baginsky (A. 58a-59a).

Veterans Administration regulations required that Dr. Baginsky's supervisor, Dr. Conlin, prepare an annual proficiency report on April 15, 1974, the anniversary of her hiring. The report gave Dr. Baginsky a rating of 52 out of a possible 88 points. While that was a "satisfactory" score under the applicable regulations, both the trial court and the Court of Appeals held that the rating was "marginal." (A. 75a.) This determination was based on the fact that Dr. Conlin had never given a physician such a low score and on his comments at the end of the report that at no time during her service had

operations in the laboratory been run smoothly. Dr. Conlin concluded in the report that "her retention is contingent upon a substantial improvement in her performance." (A. 76a.) The trial court found that Dr. Baginsky was never shown a copy of the report, as the regulations required (A. 76a).

Because she was a "marginal" employee, the trial court found that her supervisor should have met with Dr. Baginsky in a "counseling conference" no later than 90 days prior to the due date for her annual report, that is, no later than January 15, 1974. If there were no improvement within the following 30 to 60 days, a second counseling conference had to be held, after which the supervisor should have prepared a memorandum indicating the reasons for the conference, the deficiencies at issue and the suggested solutions. If there were still no improvement, an "unsatisfactory" rating would be given and steps initiated to discharge the employee (A. 76a-77a).

The three judge panel of the Court of Claims, in denying the respondent's motion for summary judgment, had termed the counseling regulations "an important protection for the employee since it gives an opportunity to improve his work and avoid dismissal during the later part of the [three year] probationary period." (A. 81a.)

The three judge panel went on to rule that:

> The failure of plaintiff to correct her deficiencies directly led to her dismissal. Had she been properly counselled and shown her poor proficiency report (and we indicate no views here on that question), she might have been able to improve her performance and avoid dismissal (A. 81a-82a).

Accordingly the three judge panel remanded the case to the trial division of the Court of Claims "to determine whether

plaintiff was shown her proficiency report dated April 15, 1974 at that time or given counselling as the Manual requires." (A. 82a.)

The trial court concluded that the Veterans Administration had utterly failed to comply with its regulations in connection with the report and the required counseling. It rejected as mistaken the statement of Dr. Conlin in the report itself that he had discussed the report with Dr. Baginsky (A. 35a). The court found that Dr. Baginsky never saw the report until a year after her 1975 discharge, when she received it in response to a Freedom of Information request (A. 47a). The court found that an April 22, 1974 meeting between Drs. Baginsky and Conlin was so inadequate that "[t]he evidence indicates that Dr. Conlin either did not discuss the proficiency report with plaintiff or discussed it in such an incomplete manner that the discussion did not adequately convey to plaintiff all the information she needed to understand her supposed shortcomings and to improve her performance thereafter." (A. 67a.)

The trial court went on to examine documents prepared by Dr. Baginsky's supervisors after the April 1974 report to determine whether she had been shown the report in April 1974 or counseled in connection with the report. The trial court stated:

> Subsequent events [after April 1974] are not directly relevant to the issue here on remand. The issue as set forth in the court's order of October 19, 1979 is "whether plaintiff was shown her proficiency report dated April 15, 1974 at that time or given counselling as the Manual requires." However, several documents subsequently prepared in late 1974 and early 1975 in connection with her later removal shed light on the above-stated issue. They confirm that plaintiff's supervisors had regarded

her as a marginal or unsatisfactory employee prior to the April 15, 1974 proficiency report (A. 68a).

The subsequent documents which the court dealt with included a "Proposed Separation from Employment of Susanna Baginsky, M.D. Chief, Laboratory Service" which Dr. James Baker, Director of the hospital, submitted to the Veterans Administration Central Office on November 15, 1974. That document by and large recounted the complaints which arose during Dr. Baginsky's first year. The Proposed Separation formed the basis for the proceedings which later led to her discharge in May, 1975. The trial court found evidence in the Proposed Separation which indicated that the April 1974 report had not been discussed with Dr. Baginsky (A. 68a-70a).

The trial court next examined a document submitted by Dr. Conlin on February 14, 1975 entitled "Items for Professional Standards Board Review Concerning Dr. Susanna Baginsky, Chief, Laboratory Service." That document, which tracked the complaints in the Proposed Separation, admitted that the April, 1974 report was not discussed directly with Dr. Baginsky (A. 70a-71a).

Finally, the trial court reviewed a March 12, 1975 memorandum of Dr. Conlin which admitted that Dr. Baginsky had not been shown the April, 1974 report (A. 71a).

The trial court concluded by quoting from the opinion of the three judge panel:

> • • • We conclude that there is a sufficient relationship between the alleged violations in this case and the dismissal to sustain plaintiff's cause of action. • • • The system evidently is intended in part to provide employees with an opportunity to correct any deficiencies in their

> performance. The failure of plaintiff to correct her deficiencies directly led to her dismissal. Had she been properly counselled and shown her poor proficiency report (and we indicate no views here on that question), she might have been able to improve her performance and avoid dismissal (A. 48a).

The trial court then found that "[p]laintiff has amply supported her allegations at trial." (A. 48a.) She did not see the report until after her discharge nor was there ever a discussion of the report. No counseling conference was held, even though she was entitled to have at least one, and possibly two conferences. No memorandum of the discussion of the counseling conference was ever prepared, outlining the discussion and describing her alleged deficiencies. The trial court concluded that the haphazard discussions of the purported shortcomings failed to convey the seriousness of the situation or that her job was in jeopardy (A. 58a-59a, 67a).

In sum, the trial court concluded:

> This is literally a case in which "the facts speak for themselves." The relevant regulations are based on statutes and clearly have the force and effect of law. They in fact provide within the regulations themselves that no deviation from them are permissible. Moreover, they highlight their own importance in providing a basis for keeping employees informed of what is expected of them, and for determining how they are measuring up, and whether their probationary appointments will be made permanent. (Footnotes omitted.) (A. 47a.)

After again reviewing the applicable counseling regulations, the court stated that "[n]one of this was done. In fact, *the regulations do not appear to have been followed in any material respect.*" (Emphasis added.) (A. 49a.)

The defendant appealed to the Court of Claims. Because of the effect of the Federal Courts Improvement Act of 1982, Pub.L. 97-164, 96 Stat. 25, the appeal was heard by the United States Court of Appeals for the Federal Circuit. The Court of Appeals reversed in a two to one decision. It held that the trial court had interpreted too narrowly the earlier decision of the three judge panel of the Court of Claims by failing to examine the actions of the Veterans Administration between the time of the inadequate counseling and review of the April 15, 1974 annual report, and the May 19, 1975 termination. Judge Kashiwa dissented. While agreeing with the majority that the trial court had too narrowly examined the counseling issue, he urged the court to remand the case to the trial court for initial fact findings on the new issue.

Rather than remand to the Claims Court, as it conceded was the more normal judicial response in the circumstances (A. 10a), the Court of Appeals proceeded to make fact findings upon issues which the trial court had not made findings and upon which the parties had not fully tried the case.

The Court of Appeals found that the Veterans Administration was not required by its regulations to counsel Dr. Baginsky about her shortcomings in connection with the 1975 termination. The Court of Appeals found that even though the Veterans Administration did not have to counsel her in 1975, there had been two meetings prior to the 1975 firing between Dr. Baginsky and her supervisor which constituted "counseling." The trial court had not made findings on either of those meetings.

The trial court had made no findings on any complaints about Dr. Baginsky's performance between April, 1974 and

her discharge in 1975. In spite of this, the Court of Appeals found that the failure to counsel in 1974 did not "taint" the 1975 discharge. The court stated:

> Considering all the circumstances, we cannot say that the lack of counseling in connection with the 1974 annual proficiency report or the failure of the VA to show that report to her at the time of its preparation denied her the opportunity to improve her performance and thus avoid dismissal. Accordingly, we hold that the lack of counseling concerning the annual deficiency [*sic*] report and the failure to show her that report did not invalidate the VA's discharge of Dr. Baginsky following the preparation of her unsatisfactory special proficiency report of February 1975 (A. 15a).

That finding by the Court of Appeals was directly contrary to the decision of the three judge panel of the Court of Claims that there was such a link (A. 81a). It was also directly contrary to the trial court's finding that Dr. Baginsky had proven her allegations that the 1974 proceedings were wholly improper and that the failure to counsel her in 1974, and to inform her of the purported shortcomings, led directly to her termination in 1975 (A. 48a).

The three judge panel of the Court of Claims, in its earlier decision, recognized that the dismissal in 1975 was, viewed by itself, procedurally proper. It stated:

> This case is unusual in that the dismissal proceeding itself apparently was conducted in compliance with all applicable regulations, and the claim is that there were earlier violations of a regulation which tainted the dismissal. We conclude that there is a sufficient relationship between

> the alleged violations in this case and the dismissal to sustain plaintiff's cause of action (A. 81a).

On appeal, the Court of Appeals did not address that passage of the earlier opinion of the three judge panel of the Court of Claims. Instead, it asserted that the Court of Claims did not have before it the record developed in the trial court and was unaware of the "counseling" Dr. Baginsky received in connection with the 1975 special proficiency report. The trial court, of course, had made no findings about any such "counseling" and had made findings consistent with the Court of Claims' earlier view that there was a causal relationship between the failure to counsel in 1974 and the discharge. The Court of Appeals made no finding of clear error by the trial judge, nor could it have in light of the extensive and well documented fact findings.

Judge Kashiwa in dissent argued that the Court of Claims has not been given an opportunity to decide the factual and legal questions of the counseling issue.

> There has been no final decision as to that issue [counseling], yet the majority finds it appropriate to usurp the function of the Claims Court and make its own *de novo* factual findings. The majority fails to recognize that this court and the Claims Court are not a single court with both original and appellate jurisdiction, as was a predecessor court, the Court of Claims. The jurisdiction of this court, like that of the other courts of appeals, is exclusively appellate (A. 16a).

Argument.

I. THE COURT SHOULD ALLOW THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT DEPARTED FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS BY FAILING TO APPLY THE PRINCIPLES OF THE CLEAR ERROR DOCTRINE MANDATED BY CLAIMS COURT RULE 52(A).

This case presents an extraordinary instance of the failure of a court of appeals to respect the clear error doctrine embodied in Claims Court Rule 52(a), as interpreted by this Court. The Court of Appeals decided that the trial court failed to make critical fact findings because it erroneously interpreted a prior decision of the Court of Claims. Instead of remanding for new fact findings in light of the proper legal standard, the Court of Appeals examined the record, made findings on issues which the trial court did not address, which issues the parties at trial did not fully contest. It reversed the crucial factual finding that Dr. Baginsky's termination in 1975 was directly linked to the wholly improper procedures surrounding her annual proficiency review in 1974. The court did this without reference to the clear error doctrine or to Rule 52(a).

In one sense, the Court of Appeals' failure to adhere to the clear error doctrine is perhaps understandable. This case was originally brought in the Court of Claims. At that time, the Court of Claims was a two-part court with both trial and appellate functions. The appellate functions of the old Court of Claims involved more of a role for the court in the fact finding. At the time of the trial, Rule 147(b) of the Court of Claims Rules provided:

> *Trial Judge's Report.* The court may adopt the trial judge's report, including conclusions of fact and law, or

> may modify it, or reject it in whole or in part, or direct the trial judge to receive further evidence, or refer the case back to him with instructions. Due regard shall be given to the circumstance that the trial judge had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the trial judge shall be presumed to be correct.

By its own terms, the Court of Claims, under Rule 147(b), did not have to give the kind of deference to the trial judge's findings as Rule 52(a) of the Federal Rules of Civil Procedure demands of the courts of appeals.

Under the Court of Claims Rules in effect at the time the action was filed, the trial judge merely filed a report of his findings of fact and recommendation for the conclusion of law. Rule 134(h) of the old Court of Claims Rules provided in relevant part:

> *Content of Trial Judge's Report; Findings of Fact; Conclusion of Law.* In every case tried on the merits . . . , the trial judge shall ascertain the facts from the evidence and file with the clerk a report of his findings of fact and, unless otherwise directed by the court, his opinion and recommendation for the conclusion of law, which report shall constitute a part of the record.

Thus, the trial judge in the Court of Claims recommended a decision to the Court of Claims, which, under Rule 147(b), was not bound by the strictures of the clear error doctrine.

The Federal Courts Improvement Act of 1982 altered not only the structure of the old Court of Claims, but also the procedure governing the trial and appeal of cases. The Court of Appeal for the Federal Circuit was established and given jurisdiction over appeals from final decisions of the United States Claims Court. 28 U.S.C. § 1295(a)(3). The role of the former Court of Claims as a finder of fact was eliminated. Under § 403 of the Act, Pub.L. 97-164, cases pending on the docket of the Court of Claims, in which, as here, a report on the merits had been filed or in which a request for review was pending, were transferred to the Court of Appeals for the Federal Circuit on October 1, 1982. The newly established Claims Court was given jurisdiction to enter judgment on cases of this nature, 28 U.S.C. § 1491(a)(1). Judgment was entered in this case on October 8, 1982 by the Claims Court (A. 85a), in accordance with an October 4, 1982 order of the Court of Appeals for the Federal Circuit (A. 86a).

The United States Claims Court adopted new rules, effective October 1, 1982, modeled after the Federal Rules of Civil Procedure. The new rules govern further proceedings in cases pending on October 1, 1982, unless the court, for stated reasons, otherwise orders. Claims Court Rule 1(a)(1). No such order was entered in the instant case. By the terms of the Court of Appeals' order of October 4, 1982, this case should have been treated like an appeal from a final judgment, governed by Rule 52(a). Rule 52(a) of the new Claims Court Rules is identical to Rule 52 of the Federal Rules of Civil Procedure, except for provisions dealing with jury trials and masters which are inapplicable to the Claims Court.

In review of this case the Court of Appeals ruled as if it were still the Court of Claims. It accepted certain of the trial judge's findings, rejected others without regard to Rule 52(a) and made its own findings on issues which the trial court had not considered and which the parties had not fully contested.

It was apparently out of concern that the differences between the new Court of Appeals and the former Court of Claims were being overlooked that prompted Judge Kashiwa's dissent below.

The proper standard to be applied on review of fact findings by the Claims Court is a continuing source of controversy within the Court of Appeals for the Federal Circuit. This and other panels have split over the question, prompting dissents and the application of different standards depending on which panel was sitting. *Compare* the instant case and *Brunswick Bank & Trust Co.* v. *United States*, slip. op., No. 184-80 (Fed. Cir. May 9, 1983) (Court of Appeals finds facts in absence of fact findings by Claims Court; one judge dissents) with *Hardee* v. *United States*, slip op. at 17 n.1, No. 84-79 (Fed. Cir. May 11, 1983) (panel of five judges splits, the majority claiming that the dissenters wanted to overturn the trial court's fact findings that were not clearly erroneous). *See also Cherry* v. *United States*, 697 F.2d 1043 (Fed. Cir. 1983); *Disabled American Veterans* v. *United States*, 704 F.2d 1570 (Fed. Cir. 1983).

A. *Reversal of Fact Finding of Causation.*

The law has long been settled that a court of appeals can only reverse a trial court's fact finding when clear error is found. In *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948), this Court traced the history of the clear error doctrine and elaborated the often quoted test for its application: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

When compared to that standard, the action of the Court of Appeals cannot stand. The most important way in which the

Court of Appeals erred in this action is its treatment of the causation issue — was Dr. Baginsky's termination in 1975 caused (or "tainted" to use the word of the Court of Appeals) by the failure to show her the April 1974 report and the failure to counsel her about her purported shortcomings, as required by the regulations? The trial court stated its agreement with the earlier decision of the three judge panel of the Court of Claims that there was a "sufficient relationship" between the violations and the dismissal. The trial court found the allegations to have been proven.

With little analysis, or explication of its reasoning, the Court of Appeals set aside this finding. It did not state that it deemed the finding to be clearly erroneous. Instead, it characterized as dictum the statement in the prior opinion of the Court of Claims that if Dr. Baginsky had been properly counseled, "she might have been able to improve her performance and avoid dismissal." (A. 82a.) After its own review of the record, on issues as to which the trial court had made no findings, the Court of Appeals stated that it was unable to say that the regulatory failings denied Dr. Baginsky the opportunity to improve her performance.

It is apparent that the Court of Appeals took a different view of the evidence than the trial court. The Court of Appeals cannot reverse the judgment of the trial court merely because it takes a different view of the evidence. In *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495-496 (1950), this Court addressed precisely this situation:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the district court apparently deemed innocent. . . . We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous." (Citations omitted.)

The reasons for this deference stem from the greater opportunity of the trial court to evaluate the evidence and from an appropriate respect for the differing functions of trial and appellate courts. This Court has consistently reversed decisions of the courts of appeals when the function of the trial court as fact finder has been invaded by the appellate court. For instance, in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), this Court reversed the decision of the Court of Appeals because it had violated the clear error doctrine in setting aside a fact finding of the district court:

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.

Id. at 123, quoting from *United States Gypsum, supra.*

In the instant case, there can be no doubt that the trial court's finding of the causal link between the violation of the VA regulations and her discharge is a finding of fact to which the clearly erroneous standard applies. In *McAllister* v. *United States*, 348 U.S. 19 (1954), the Court of Appeals had reversed the district court's finding that the plaintiff's polio was caused by the negligence of the vessel's owner. (The ac-

tion was brought under the Suits in Admiralty Act.) This Court reversed, holding that the Court of Appeals failed to apply the clear error standard in setting aside that finding of the district court. The Supreme Court noted that the causation determination appeared to be based on a reasonable inference, and that it could not say that it was clear error.

More recently, in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), the Court held that a district court's determination of whether there was intentional racial discrimination is a question of fact which can only be reversed by a court of appeals if clear error is shown.

The Court of Appeals appears to have shifted the way it viewed the "taint" issue from the opinion of the three judge panel of the Court of Claims. In denying the government's motion for summary judgment, the panel stated that if plaintiff proved the failure to counsel, she should recover — the regulatory failure was linked to the subsequent termination, even though the termination itself was procedurally proper. It appeared to create a presumption, in Dr. Baginsky's favor, that the irregularities tainted the subsequent termination and it was presumed that if properly counseled, Dr. Baginsky's performance would have improved.

Without so stating, the Court of Appeals appears to have reversed the presumption. The only stated reason for the change are two counseling sessions it found in late 1974 and early 1975. It presumed that the termination, if procedurally proper, was not tainted by the earlier irregularities. In the absence of proof by Dr. Baginsky that there was taint, and that her performance would have improved, she could not recover.

The problems of the Court of Appeals' approach are obvious. The Court of Appeals ignored any notion that it was bound by the law of the case. *United States* v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950). The issue was inadequately tried on the post-April 1974

events. The trial court made *no* findings on counseling after April 1974. The parties and the trial court operated on the assumption that the prior decision of the Court of Claims settled the issue of the link between the procedural irregularities and the termination. No effort was made by the trial court to determine what complaints about Dr. Baginsky arose after April 1974. Indeed, the trial court said the post-April 1974 complaints "are not relevant here." Nor was there any examination of whether Dr. Baginsky's performance improved on those occasions, if any, where the purported shortcomings were properly brought to her attention. Judge Kashiwa in dissent noted that the decision of the Court of Appeals denied the parties the right to fully develop their case (A. 18a). In effect, the Court of Appeals changed the race course after the race had been run. Its decision cannot stand.

B. *New Fact Findings in the Court of Appeals.*

The Court of Appeals erred in making fact findings on issues which the trial court did not address. The court held that the trial court had erred in looking only at the issue of counseling in connection with the April, 1974 proficiency report. Instead, the court held that the trial court should have determined whether any counseling took place after the April 1974 report, and should have determined whether that counseling was adequate to eliminate the "taint" which arose from the regulatory violations in 1974.

The court conceded that the normal course would be to remand the case to the trial court for reconsideration under the proper standard. It did not feel compelled to do so for several reasons: In its view the record left no doubt as to the decision that must result; the record was short; the legal and factual issues were uncomplicated; and the case had been pending for

over three years (remand for trial on count two was necessary in any event). As will be seen, none of those reasons justifies the course followed by the Court of Appeals. Indeed, its action violates established case law that, where findings must be vacated because the trial court applied the wrong legal standard, the proper course is to remand for further factual findings.

In support of its action, the court cited two cases from this Court and two from the old Court of Claims. None of the cited cases supports the action of the Court of Appeals. The first case, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), the deputy commissioner, in an action under the Longshoremen's and Harbor Workers' Compensation Act, had found as a fact that the death of an employee-claimant was incident to his employment, and that he was thus entitled to recover. The employer moved to set aside the award in the district court. The district court affirmed the deputy commissioner's finding, stating that there was "substantial evidence" to support the finding that the death occurred as an incident of employment. The Court of Appeals for the Ninth Circuit reversed the district court, holding that it applied the wrong standard of law in determining the scope-of-employment question. The Supreme Court reversed the Ninth Circuit, holding that the district court applied the proper standard of law. The Court indicated that rather than remand to the Ninth Circuit for consideration of whether the finding was supported by substantial evidence, it would review the matter. It affirmed the district court's finding. Thus, in no sense does *O'Leary* support the Court of Appeals' position that it could make the findings of fact on issues the trial court did not consider.

The Court of Appeals cited a dissent in *Cahill* v. *New York, New Haven & Hartford Railroad Co.*, 351 U.S. 183, 188-189 (1956). The dissent has no bearing on this case. The one

remark in the dissent about the necessity for remand concerns an issue of *law*, not an issue of fact. That is hardly compelling authority for the Court of Appeals' action.

The citation of *Navajo Tribe of Indians* v. *United States*, 624 F.2d 981 (Ct. Cl. 1980), cuts against the action of the Court of Appeals in this action. It might well be relied upon by Dr. Baginsky in urging this Court to grant the petition for a writ of *certiorari*. The *Navajo Tribe* case was one of a series of Indian Commission accounting actions. The plaintiff tribe urged the Court of Claims to set aside a finding of the trial judge and remand the matter for further findings. The Court of Claims upheld the trial judge's findings and declined to remand for trial on the issue of the meaning of certain words in a treaty. The tribe had given no hint of how it proposed to contradict the unambiguous language of the treaty. *Id.* at 996.

Even more directly on point, the Court of Claims in the *Navajo Tribe* case remanded the matter to the trial court on an issue as to which no findings had been made:

> The trial judge does not directly address these points [non-interest bearing accounts] and we cannot say that the contentions are frivolous or insubstantial on their face (or as argued to us). But at the same time we are not in a position to resolve these issues, several of which embody factual components. We think therefore that they should be investigated further and plaintiff should be permitted to show, if it can, that such deposits of tribal funds in non-interest bearing or non-fruitful accounts were wrongfully made.

Id. at 994.

Thus, if the Court of Appeals had followed the *Navajo Tribe* case, it would have remanded for findings in the first instance by the trial court. In the instant case, plaintiff

presented evidence on the post-April, 1974 events only to demonstrate the lack of counseling in connection with the 1974 report. That was the understanding of plaintiff and of the trial court of the scope of the trial on count one. Thus, if the case is remanded, plaintiff will offer further evidence, not now in the record, of the events between April, 1974 and May, 1975. The request for a remand in these circumstances is far different than the bare assertion by plaintiff in the *Navajo Tribe* case that it might be able to contradict the clear language of the treaty. There is no objective account the language of which binds the parties in this case.

The final case cited in support of the Court of Appeals' action is *Minnesota Chippewa Tribe* v. *United States*, 222 Ct.Cl. 551 (1980). Again, this case does not support the action of the Court of Appeals. The Court of Claims in *Minnesota Chippewa* determined as a matter of *law*, not fact, that the plaintiff could recover interest it had been charged as a litigation expense by an expert. The government had claimed that it could not be charged interest because of its sovereign immunity. The Court of Claims held that the interest charge was a proper litigation expense, and thus chargeable to the government. While the procedural posture of the case is unclear from the facts stated in the opinion, it appears that the Indian Compensation Commission had either recommended payment, or made no recommendation at all. In any event, there was no *factual* issue which the Court of Claims had to resolve on appeal.

For many years this Court has held that the proper procedure for a court of appeals to follow, when it determines that the trial court failed to make adequate findings because of a legal error, is to remand the case to the trial court for further findings in light of the appropriate legal standard. That procedure is appropriate in view of the opportunity of the trial judge to determine the credibility of witnesses and because the trial court is more intimately familiar with the record.

In *Guzman* v. *Pichirilo*, 369 U.S. 698 (1962), for example, the Court of Appeals had reversed the district court and ordered entry of judgment for the defendant because the trial court applied the incorrect legal standard to an issue in the case. The Supreme Court reversed on the ground that the disputed finding was not clearly erroneous under the proper legal standard. The court went on to add that:

> If we were convinced, as was the Court of Appeals, that the trial court's action was colored by a misunderstanding of such legal principles, we would have to remand, as the Court of Appeals should have, for further findings by the trial court on the credibility of the owner's witness.

Id. at 701.

Similarly, in *Kelly* v. *Southern Pacific Co.*, 419 U.S. 318 (1974), the Court of Appeals had reversed a findng that a worker was an employee of the defendant so that he could bring his action under the Federal Employees' Liability Act. The Supreme Court reversed and ordered that the case be remanded to the district court for further findings in light of the proper legal standard. The court emphasized the deference which must be shown to the trial court as the finder of fact in the first instance. *Cf.*, *DeMarco* v. *United States*, 415 U.S. 449 (1974) (factual issue which arose while case was on appeal to the Court of Appeals should have been resolved by remanding to the trial court for an evidentiary hearing).

Last term this Court again emphasized the importance of remanding factual issues for determination in the first instance in the trial court. In *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), the court reiterated *DeMarco's* holding that the matter should be returned to the district court for resolution: "When an appellate court discerns that a district court has

failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings . . . . *Id.* at 291. *See also, Id.* at 287 n.17; *Inwood Laboratories* v. *Ives Laboratories*, 456 U.S. 844, 857 n.19.

In *Pullman-Standard*, *supra*, 456 U.S. at 292, the court stated: "Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." In the instant case, the Court of Appeals thought that only one result was possible. That ruling is erroneous. The trial court made detailed findings of the nature of the required counseling, including the fact that it must be confidential and must be memorialized in writing. It held that such counseling had not taken place in connection with the April, 1974 report. The trial court made no findings on the events after April, except insofar as they bore on the issue of counseling in connection with the April 1974 report. The Court of Appeals found that the regulations did not specify the nature of the counseling. The Court of Appeals lent greater credence to Dr. Conlin than did the trial court, (A. 13a), and accepted evidence which the trial court rejected (A. 14a). Those findings suggest that the Court of Appeals erred in reaching the question of whether the post-April 1974 conversations it referred to constituted counseling within the meaning of the VA regulations.

The trial court's findings compel the conclusion that the Court of Appeals erred in reaching the issue of the link between the April 1974 violations and the 1975 discharge. The trial court found that the discharge proceeding was initiated by the Proposed Separation which Dr. Baker, Director of the hospital, submitted in November, 1974 to the VA Central Office. Thus, the discharge was initiated only seven months after the regulatory violations. The trial court found that the Proposed Separation largely tracked the purported deficiencies

noted in the April, 1974 report. The trial court found that the April, 1974 violations were linked with the 1975 separation. The link between the violations in April, 1974 and the discharge becomes even clearer when one considers the trial court's finding that the "Items for a Professional Standards Board concerning Dr. Susanna Baginsky" in February, 1975, which formed the basis for her ouster, was almost identical to the events depicted in the Proposed Separation. Thus, with a few items added, Dr. Baginsky was discharged in large part because of events which occurred during her first year of service. In light of the trial court's finding that she received *none* of the required counseling about those events, and that the mandatory regulations were not followed "in any material respect," it cannot be said that only one result was possible.

The issue was capable of resolution either way. In these circumstances, it was incumbent upon the Court of Appeals to remand for further findings by the trial court. It was the trial court which had the advantage of seeing the witnesses and assessing their credibility. In large part, the trial court resolved the credibility questions in Dr. Baginsky's favor. Whether the Court of Appeals disagreed with that result should not be the question — that is a determination that only the trial court can make. In similar circumstances this Court rejected the Court of Appeals' reversal of the trial judge's findings in *Inwood Laboratories, supra*: "By rejecting the District Court's findings simply because it would have given more weight to evidence of mislabeling than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact." *Id.* at 856.

The issue involved in the instant case, causation or "taint" is similar in many ways to the questions of intent, design and motive. *Cf., United States* v. *Yellow Cab Co.*, 338 U.S. 338 (1949). In *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960),

the Court explained the reasoning behind the special deference which appellate courts should give to the trial court's determination of such issues:

> Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.

Id. at 289.

The nature of the factual inquiry closely parallels that described by the court in *Duberstein*. How does a court determine whether the total noncompliance with the VA regulations through Dr. Baginsky's first year of employment, and in particular the failure to discuss the perceived shortcomings with her and the threat which they posed to her job contributed in a substantial way to her discharge in 1975? It must consider her testimony, credibility and demeanor. It must consider the testimony, demeanor and credibility of other principals. Those inquiries are rarely easy and are wisely left within the exclusive province of the fact finder.

Conclusion.

For these reasons Dr. Baginsky asks this Court to grant her petition for a writ of *certiorari* and to order that the case be remanded to the trial court with instructions to make further findings on the basis of such further testimony it deems necessary.

Respectfully submitted,

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Appendix.

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SUSANNA M. BAGINSKY,
APPELLEE,
v.
THE UNITED STATES,
APPELLANT,

APPEAL No. 519-78.

United States Court of Appeals,
Federal Circuit.

Jan. 10, 1983.

Physician brought suit challenging termination of her employment with Veterans Administration and seeking back pay and reinstatement. Action was filed in the United States District Court for District of Massachusetts and transferred to the Claims Court, which set aside the termination, and Government appealed. The Court of Appeals, Friedman, Circuit Judge, held that: (1) there was no requirement for counseling in connection with preparation of special proficiency report containing unsatisfactory rating for physician, and (2) failure of VA to properly counsel physician before preparing annual proficiency report and its contemporaneous failure to show her annual proficiency report did not so taint subsequent dismissal proceedings based upon special proficiency report prepared approximately ten months thereafter, for which she was adequately counseled, that discharge, based on special proficiency report, could not stand.

Reversed and remanded.

Kashiwa, Circuit Judge, dissented in part and filed opinion.

1. Federal Courts 937

Upon laying bare error by trial judge, normal practice would be to remand case to him for reconsideration under proper

standard; that practice, however, is not inflexible and may be departed from in appropriate circumstances, particularly where record leaves no question as to decision that must result from remand.

2. **Armed Services** 102

There was no requirement for counseling in connection with preparation of special proficiency report containing unsatisfactory rating for physician in Veterans Administration hospital, and VA provided physician with more than was required, where hospital's chief of staff counseled physician at least twice prior to preparing special proficiency report.

3. **Armed Services** 102

Failure of Veterans Administration to properly counsel employee physician before preparing annual proficiency report and its contemporaneous failure to show her annual proficiency report did not so taint subsequent dismissal proceedings based upon special proficiency report prepared approximately ten months thereafter, for which she was adequately counseled, that discharge, based on special proficiency report, could not stand.

Robert M. Buchanan, Boston, Mass., argued for appellee. With him on the brief were Laura Steinberg and Sullivan & Worcester, Boston, Mass.

Allen C. Peters, Arlington, Va., argued for appellant. With him on the brief were Asst. Atty. Gen. J. Paul McGrath, and Walter A. Hall, Veterans Administration, Washington, D.C.

Before MARKEY, Chief Judge, and FRIEDMAN and KASHIWA, Circuit Judges.

FRIEDMAN, Circuit Judge.

This is an appeal from a judgment of the United States Claims Court,* setting aside the termination of the appellee's employment with the Veterans Administration ("VA") as a physician on the ground that prior to such termination the agency had not counseled appellee and provided her with a copy of her proficiency report pursuant to the requirements of its regulations. We reverse and remand to the Claims Court to decide the remaining issue in the case, which it did not reach.

I.

A. The appellee, Susanna Baginsky, is a physician specializing in pathology. In early 1973, she was appointed as Chief of the Laboratory Services at a VA hospital. This was a major post at the hospital, in which she had supervisory responsibility over a sizable number of employees in and for the proper functioning of the various divisions of the laboratory. As VA regulations required, she was given a 3-year probationary appointment. She entered on duty on April 15, 1973.

Although Dr. Baginsky apparently is a competent pathologist, the hospital management quickly became dissatisfied with her administration of the laboratory. Indeed, even before she was appointed, Dr. John F. Conlin, the hospital's Chief of Staff who interviewed her and apparently was primarily responsible for her selection, had doubts about her qualifications. In a letter to her that he drafted in April 1973 but did not send, he described certain events in the interview that displeased him and added the following parenthetical

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* Pursuant to order of this court dated October 4, 1982, Judge Spector, on October 8, 1982, entered a final judgment in accordance with his recommended decision of March 5, 1982. We treat the government's exceptions to that decision as an appeal from that final judgment.

note to himself: "(I'm being had!)." A week after Dr. Baginsky's arrival, Dr. Conlin reviewed the unsent letter and added another note: "(I've *been* had — Bill Maloney was right!)." (emphasis in original). (This referred to Dr. William S. Maloney, the dean of a local medical school who was one of the persons whose approval of the appointment was required. Dr. Maloney originally had told Dr. Conlin that he did not consider Dr. Baginsky qualified to be a chief of service, but withdrew his objection after learning that other doctors had recommended her.)

Dr. Baginsky's problems with Dr. Conlin began on the day of her arrival, when "[s]he declined to submit to the 2 to 5 days of orientation which her supervisor had planned for her" and went straight to work in the laboratory. Fdg. 17. When Dr. Baginsky started work, there "were some 'difficult situations'" in the laboratory. The staff, left unsupervised for some time between chiefs, "was divided into feuding groups, and various members of the staff were not on speaking terms with other staff members." Fdg. 18.

Dr. Conlin met with Dr. Baginsky on April 26, 1973, 11 days after she started work at the hospital. Dr. Conlin "spoke with [Dr. Baginsky] about personality clashes within [the Laboratory] Service," her proposal to hire technologists (rather than bench-trained technicians), and her conflicts with the Chief of Surgery and the hospital's personnel service. Fdg. 21. Dr. Conlin had an extended discussion with her on October 23, 1973. Fdg. 23. Dr. Conlin's notes show that the October meeting included a "'[g]eneral discussion of unsatisf[actory] operations,'" Dr. Baginsky's "'harassment' of her personnel and . . . the 'general atmosphere of uncertainty and discontent'" Dr. Conlin believed to exist in the laboratory, and the problems between Dr. Baginsky and the personnel service. Fdg. 23.

In the fall of 1973, Dr. Baginsky recommended the hiring of a person to fill a critical vacancy in the laboratory for a microbiologist. The person was hired, but the day after he came to work in February 1974, Dr. Baginsky urged that he should immediately be discharged because he was unqualified to do the work. Dr. Conlin "assigned the entire blame for the . . . matter" to Dr. Baginsky, who apparently was unaware that she was responsible for verifying the professional qualifications of new laboratory employees. Fdg. 32.

VA regulations require the preparation of an annual proficiency report for all physicians. VA Manual, MP-5, pt. II, ch. 6. Dr. Conlin, who prepared the proficiency report for Dr. Baginsky covering the first year of her service (from April 15, 1973 to April 15, 1974), gave her a rating of 52 out of a possible 88. The VA had only two descriptive ratings — "satisfactory" and "unsatisfactory" — and any rating above 38 was "satisfactory." The 52 rating Dr. Conlin gave Dr. Baginsky was the lowest rating he ever had given. He never had given a rating of lower than 60, and his average ratings ranged from the "upper-sixties to the middle-seventies." Fdg. 37. Other VA officials testified that most physicians received ratings in the 65-75 range.

In the "comments" section of the report, Dr. Conlin criticized several aspects of Dr. Baginsky's performance. He stated that "'[a]t no time' during" Dr. Baginsky's service as chief of the laboratory "had daily operations in her section 'been conducted in a smooth running fashion,'" and he concluded that "'[d]esire for her retention is contingent upon a substantial improvement in her performance.'" Fdg. 38. Dr. Baginsky was not shown a copy of the April 15, 1974 proficiency report until much later. Dr. Conlin met with Dr. Baginsky on April 22, 1974. In his deposition he testified that at that meeting he "went over the contents" of the report. In her testimony, Dr. Baginsky denied that he had done so.

The hospital management's dissatisfaction with Dr. Baginsky's running of the laboratory continued throughout 1974. In August of that year, a survey team the VA Central Office in Washington had selected, made a periodic examination of the hospital. At least five laboratory employees requested individual interviews with the team. The survey report was critical of the laboratory and recommended that a "special sight [sic] visit" be made. That would have been a visit to and examination of the laboratory by a "peer-review group" of pathologists from other V.A. hospitals," "being a reflection that it's not measuring up." The hospital director approved the recommendation.

The VA Central Office advised the hospital that it did not approve a special "sight visit" during an employee's probationary period. It suggested that if Dr. Baginsky's performance was unsatisfactory, the hospital might consider terminating her.

On November 15, 1974, Dr. Conlin prepared, and the hospital director signed and forwarded to the VA Central Office, a report describing Dr. Baginsky's deficiencies and recommending termination of her employment. Three days later, Dr. Conlin met with Dr. Baginsky and described a number of areas in which her performance was deficient. Dr. Conlin further testified in his deposition that "[a]t various times I stated to Dr. Baginsky that, 'I am appalled. I am thoroughly dissatisfied.'" Def.Exh. 6 at 93.

On December 19, 1974, the hospital received from the VA Central Office authority to remove Dr. Baginsky. Although at the time Dr. Conlin apparently had not definitely decided to take that action, he "saw it as unavoidable; that I had gone as far as I could on counseling." Def.Exh. 6 at 92.

On February 3, 1975, six employees of the laboratory submitted to Dr. Conlin various "grievances against" Dr. Baginsky and urged that she "should be removed." A week later on

February 10, 1975, Dr. Conlin prepared a special proficiency report in which he gave her an unsatisfactory rating of 27.5. He showed her a copy of the report on February 14, 1975. After the report had been approved by the hospital director (who raised the rating to 33.5, also an unsatisfactory rating), a copy was sent to Dr. Baginsky on March 4, 1975.

In the interim, Dr. Conlin had determined to convene a Professional Standards Board to consider whether Dr. Baginsky's employment should be terminated. On February 14, 1975, Dr. Conlin gave Dr. Baginsky a document entitled "Items for Professional Standards Board Review Concerning DR. SUSANNA BAGINSKY, Chief, Laboratory Service." The document contained 33 numbered paragraphs describing various incidents which Dr. Conlin believed demonstrated Dr. Baginsky's unsuitability for her position.

The Board was convened on March 7, 1975. After considering written and oral statements from VA employees, including a written statement from Dr. Baginsky, the Board concluded that Dr. Baginsky's performance was unsatisfactory and recommended that she be dismissed. This was done on May 19, 1975.

B. The petition in Dr. Baginsky's suit, which originally was filed in the United States District Court for the District of Massachusetts and transferred to the Court of Claims, sought backpay and reinstatement. It contained three counts. Insofar as here pertinent, count I (the only count the present appeal involves) alleged that the VA had violated its regulations because prior to discharging Dr. Baginsky, the agency had not counseled her as the regulations required. Count II alleged that the VA had denied her due process because the Professional Standards Board had considered material that had not been furnished to her and also evidence of additional charges about which she had not been informed. Count III alleged that there was no "substantial or rational basis" for discharging her.

The government moved to dismiss or for summary judgment. The Court of Claims granted summary judgment on and dismissed count III, but denied dismissal or summary judgment with respect to the first two counts. 221 Ct.Cl. 908 (1979).

With respect to count I, the court stated that the VA regulation requiring counseling of an employee who had served more than one year of a probationary period before such employee may be dismissed (see *infra* pp. 11a-12a) "is an important protection for the employee since it gives an opportunity to improve his work and avoid dismissal during the later part of the probationary period." *Id.* at 911. The court rejected the government's contention that under another provision of the regulation the VA could dismiss a probationary employee whether or not there had been counseling. It stated that "[a]llegations that the dismissal proceeding involved a violation of a regulation that was not apparent on the record of that proceeding would present an issue of material fact requiring a trial," and that "there is a sufficient relationship between the alleged violations in this case and the dismissal to sustain plaintiff's cause of action." *Id.* at 911-12.

Expressing no opinion on whether Dr. Baginsky had "been properly counselled and shown her poor proficiency report," the court remanded the case to the Trial Division "to determine whether plaintiff was shown her proficiency report dated April 15, 1974 at that time or given counselling as the Manual requires." *Id.* at 912. The court further held that count II of the petition, alleging a denial of due process, also raised factual questions that precluded granting summary judgment.

C. On the remand, the trial judge determined to try count I first. He did so because that count would require only a short trial, and if Dr. Baginsky prevailed on it, there would be no need to try count II, which would require a longer trial. Be-

cause Dr. Conlin died before the trial began, his deposition testimony and attached exhibits were introduced in evidence. Dr. Baginsky and her husband and three officials of the Veterans Administration testified.

The trial judge held that the VA had not complied with the counseling regulations in connection with preparation and issuance of Dr. Baginsky's April 15, 1974 proficiency report. He ruled that the agency's noncompliance with the regulations invalidated the discharge of Dr. Baginsky and that she was entitled to recover backpay and to be reinstated to her position.

II.

In invalidating Dr. Baginsky's discharge, the trial judge interpreted the prior Court of Claims decision in this case as (1) limiting him to determining whether Dr. Baginsky had been properly counseled in connection with the preparation of her 1974 proficiency report and whether that report had been shown to her when it was prepared, and also as (2) indicating that if these questions were answered negatively, Dr. Baginsky's discharge was improper. Although that prior decision may not have been as clear and explicit as it could have been so that the trial judge understandably so interpreted it, it did not restrict the issues on remand as the trial judge believed.

The decision of the Court of Claims pointed out that the purpose of the VA counseling requirements is "to provide employees with an opportunity to correct any deficiencies in their performance and thereby to avoid dismissal." The statement at the end of the discussion of count I that the court was remanding to the Trial Division "to determine whether plaintiff was shown her proficiency report dated April 15, 1974 at that time or given counselling as the Manual requires" was not intended to limit the trial judge to considering whether proper counseling was given in connection with that report. Rather,

it contemplated a full review of the broader issue whether, prior to her discharge, Dr. Baginsky had been given the counseling the Manual required.

[1] Upon laying bare the error by the trial judge, the normal practice would be to remand the case to him for reconsideration under the proper standard. *Cf. Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145, 60 S.Ct. 437, 442, 84 L.Ed. 656 (1940). See, for example, *Ardell Adams v. United States*, 680 F.2d 746, 497 (Ct. Cl. 1982). That practice, however, is not inflexible and may be departed from in appropriate circumstances, particularly where, as here, the record leaves no question as to the decision that must result from a remand.

In the present case the record is relatively short, and the legal and factual issues are uncomplicated and not difficult to resolve. The case has been pending for more than 3 years. In order to expedite its final resolution, we think it appropriate now for us to decide the counseling issue. *Cf. O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 781 S.Ct. 470, 472, 95 L.Ed. 483 (1951); *Cahill v. New York, N.H. & H. R.R.*, 351 U.S. 183, 188-89, 76 S.Ct. 758, 761, 100 L.Ed. 1075 (1956) (Black, J. dissenting). See, for example, *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 224 Ct.Cl. 171 (1980), and *Minnesota Chippewa Tribe v. United States*, 650 F.2d 285, 222 Ct.Cl. 551, 555-56 (1980).

III.

A. The requirements for counseling in the VA regulations that the trial judge found the agency had violated deal with counseling in connection with a physician's annual proficiency report. They provide that "[a] counseling conference will be conducted for marginal or unsatisfactory employees not later than 90 days prior to the due date of the annual report" and

that "[f]ailure to correct the deficiencies during the ensuing 30 to 60 days, depending on the circumstances, will be cause for a second counseling conference." VA Manual, D.M. & S. Supplement, MP-5, Part II ("Manual"), ¶¶ 6.06c(5), e(2). The trial judge found that Dr. Baginsky had been a marginal employee during her first year of service and that prior to preparing her annual proficiency report (due on April 15, 1974), Dr. Conlin had failed to conduct either the 90-day or the 30- to 60-day counseling conference.

The purpose of the counseling procedures is, as noted in the prior Court of Claims decision, to give a physician whose performance is marginal or unsatisfactory the opportunity to improve before his or her proficiency report is prepared. If, despite the counseling, performance does not improve, the usual result is that an employee receives an unsatisfactory rating and discharge proceedings are initiated. The regulations so provide. They state: "In the event there has not been sufficient improvement following the second counseling conference and the employee's performance is unsatisfactory, an unsatisfactory proficiency rating will be assigned the employee, and action will be taken as indicated in paragraph 6.07." Manual, ¶ 6.06e(3). In the case of a temporary employee, such as Dr. Baginsky, paragraph 6.07 provides for the convening of a Professional Standards Board.

Further indication that the 90- and 30- to 60-day counseling procedures apply only where an unsatisfactory rating is contemplated on an annual performance report is contained in paragraph 6.06f of the Manual. This provision, which follows a section of the Manual captioned "Unsatisfactory Performance," provides: "If an unsatisfactory rating is contemplated and it has clearly been established that the employee has not been counseled concerning his unsatisfactory service is provided for above, a recommendation will be made to the approving official to delay the annual rating for a period not to

exceed 90 days. During this period the employee will be counseled as outlined above. The approving official will assign an annual rating at the end of the period cited above."

In the present case, however, Dr. Baginsky was not discharged because she received an unsatisfactory rating on her annual proficiency report. Her rating there was satisfactory. Although the hospital management was disappointed with her performance, Dr. Conlin hoped that she would improve sufficiently to warrant her retention.

[2] Dr. Baginsky was discharged as a result of receiving an unsatisfactory rating on a special proficiency report prepared approximately 10 months after her first annual proficiency report. Unlike the requirements for the annual proficiency report, there is no requirement for counseling in connection with the preparation of a special proficiency report containing an unsatisfactory rating. The regulations governing the preparation of proficiency reports have separate sections dealing with annual and special reports. Manual, ¶¶ 6.05b & c. The regulations provide that a special proficiency report "will be prepared . . . [p]rior to appearance by probationary, temporary full-time, part-time, or intermittent employee before a Professional Standards Board for review . . . if more than three months have elapsed since date of last annual report." Manual, ¶ 6.05c(1)(a).

B. Although counseling is not required before preparing a special proficiency report containing an unsatisfactory rating, the record shows that Dr. Conlin counseled Dr. Baginsky at least twice prior to preparing her special proficiency report. The VA thus provided her with more than it was required to furnish. The record further shows that during her service as Chief of the Laboratory Service, Dr. Baginsky was informed repeatedly about the deficiencies in her performance and given ample opportunity to correct them.

The VA regulations do not specify the form or content of counseling conferences. They state that the conferences are to be "informal and confidential and of such nature as to inform each employee, verbally or in writing, of the manner in which he is performing or failing to perform his assigned duties." Manual, ¶ 6.06c(1). Dr. Conlin agreed that "in essence" the "purpose of the counseling system is an ongoing basis to advise the employees of their strengths and weaknesses." Def.Exh. 6 at 28-29. He stated that he did not notify employees in writing of a counseling conference, which "would usually be on an informal basis." *Id.* at 60. Dr. Baker, a 25-year VA employee who was the director of the hospital during Dr. Baginsky's service there and Dr. Conlin's superior, and at the time of trial held an important medical post at the Central Office, had had experience in counseling. He described counseling with physicians "generally" as "informal and very seldom is it ever reduced to writing." Transcript at 149.

Dr. Conlin testified that he met with Dr. Baginsky a number of times and discussed problems in the laboratory and the respects in which her performance was deficient. Except for one of the meetings, he made informal handwritten notes during the discussions. These notes were transcribed and introduced in evidence. Dr. Conlin listed the notes in response to a request in Dr. Baginsky's interrogatories for notes concerning his "counseling conferences" with her. He also identified various documents "which reported or refer to any counseling conferences actually held with" Dr. Baginsky.

Although Dr. Conlin's notes are cryptic, they show that counseling conferences were held in which Dr. Conlin pointed out to Dr. Baginsky her deficiencies. Two meetings are particularly significant in connection with the preparation of the special proficiency report.

At a meeting on November 18, 1974, almost 90 days before Dr. Conlin prepared the report, he discussed with her a

number of the principal problems in the laboratory service. Among them were "continuing unrest" and the possibility of an "adverse effect" on accreditation. Def.Exh. 3, Item 5. Dr. Conlin met with Dr. Baginsky again on January 21, 1975, and discussed her continuing deficient performance.

As noted, Dr. Conlin was not alive at the time of the trial. In her testimony, Dr. Baginsky acknowledged that she had met with Dr. Conlin in February 1975, when he showed her the special proficiency report. Except for that meeting, however, Dr. Baginsky stated that "I don't remember having had any meeting with Dr. Conlin" alone. Transcript at 122. This statement does not contradict the deposition testimony and notes of Dr. Conlin described above, in which he referred to a number of meetings with Dr. Baginsky. The fact that Dr. Baginsky did not remember those meetings is not inconsistent with and does not undermine the other evidence that the meetings took place, nor does it justify us in rejecting that evidence.

On the basis of the record before us, we conclude that Dr. Conlin counseled Dr. Baginsky at least twice before preparing the February 1975 special proficiency report, and that, in this counseling, he pointed out to her the respects in which her performance continued to be deficient.

C. The remaining question is whether the VA's failure to properly counsel Dr. Baginsky before preparing her April 1974 annual proficiency report and its contemporaneous failure to show her that report, so tainted the subsequent dismissal proceedings based upon the February 1975 special proficiency report (for which she was adequately counseled) that the dismissal cannot stand.

In deciding that question, the purpose of the counseling requirement must be borne in mind. As emphasized in the earlier Court of Claims decision, a major objective of the counseling system is "to provide employees with an opportuni-

ty to correct any deficiencies in their performance." 221 Ct.Cl. at 912. The court added that if Dr. Baginsky "[h]ad . . . been properly counselled and shown her poor proficiency report (and we indicate no views here on that question), she might have been able to improve her performance and avoid dismissal." *Id.*

The latter statement was made as dictum in deciding the government's motion for summary judgment. At that stage of the case, the facts as developed in the present record after trial were not before the court. The court was not aware of the details surrounding the preparation of Dr. Baginsky's February 1975 special proficiency report, including the counseling she received prior to that report. The court did not know of the numerous occasions on which Dr. Conlin and others at the hospital called to Dr. Baginsky's attention the various respects in which her operation and supervision of the laboratory were deficient and her failures to improve the performance of her duties despite receiving this advice.

[3] Considering all the circumstances, we cannot say that the lack of counseling in connection with the 1974 annual proficiency report or the failure of the VA to show that report to her at the time of its preparation denied her the opportunity to improve her performance and thus avoid dismissal. Accordingly, we hold that the lack of counseling concerning the annual deficiency report and the failure to show her that report did not invalidate the VA's discharge of Dr. Baginsky following the preparation of her unsatisfactory special proficiency report of February 1975. We therefore sustain her discharge against the challenges to it contained in count I of the petition.

The judgment of the United States Claims Court is reversed, and the case is remanded to that court to consider count II of the petition.

REVERSED and REMANDED.

KASHIWA, Circuit Judge, dissenting in part.

I agree with the majority that the prior order of the Court of Claims, 221 Ct.Cl. 908 (1979), contemplated a full review as to whether, prior to her discharge, Dr. Baginsky had been given the counseling the Manual required. The majority, however, determines this previously undecided issue on its own without a remand to the Claims Court. I would instead remand the case to the Claims Court for a determination of the counseling issue. I do not believe that it is proper or desirable for us to make our own initial fact findings on this issue without prior consideration by the Claims Court.

This court's jurisdiction is governed by 28 U.S.C. § 1295 (1982). Section 1295(a)(3) provides this court with jurisdiction to review *final* decisions of the United States Claims Court. That jurisdiction is purely statutory and may not be expanded beyond its statutory grant. *See United States v. Young*, 544 F.2d 415 (9th Cir. 1976), *cert. denied*, 429 U.S. 1024, 97 S.Ct. 643, 50 L.Ed.2d 626 (1976); *Beneficial Industrial Loan Corp. v. Smith*, 170 F.2d 44 (3rd Cir. 1948), *aff'd*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *Hatzenbuhler v. Talbot*, 132 F.2d 192 (7th Cir. 1942). The Claims Court has not been given an opportunity to decide the factual and legal questions of the counseling issue in the instant case. There has been no final decision as to that issue, yet the majority finds it appropriate to usurp the function of the Claims Court and make its own *de novo* factual findings. The majority fails to recognize that this court and the Claims Court are not a single court with both original and appellate jurisdiction, as was a predecessor court, the Court of Claims. The jurisdiction of this court, like that of other courts of appeals, is exclusively appellate. *Cf. Roche v. Evaporated Milk Association*, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). This court does not have any original jurisdiction, that jurisdiction is vested in this instance in the United States Claims

Court. 28 U.S.C. § 1491 (1982); *Cf. Whitney v. Dick*, 202 U.S. 132, 26 S.Ct. 584, 50 L.Ed. 963 (1906).

In support of its position the majority cites two Supreme Court cases. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S.Ct. 470, 472, 95 L.Ed. 483 (1951); *Cahill v. New York, N.H. & H. R.R.*, 351 U.S. 183, 188-89, 76 S.Ct. 758, 761, 100 L.Ed. 1075 (1956) (Black, J., dissenting). Neither case, however, supports the action taken by the majority today. The first, *O'Leary*, concerns the Supreme Court's ability to review the record and previously made findings of fact of an administrative body under the substantial evidence standard. In that case an administrative determination had been made that included findings of fact and those findings were subsequently upheld by the district court. The Court of Appeals then reversed on a legal issue but did not reach the factual questions. The Supreme Court reversed the Court of Appeals, found it unnecessary to remand the case and reviewed the record itself. In *O'Leary*, unlike our case, there had been a full opportunity for the fact finding body to create a complete record and make findings of fact. In our case there has been no opportunity for the fact finder, the Claims Court, to consider the issue and make appropriate findings. Further, the Supreme Court in *O'Leary* was not concerned with the ability of a court of appeals to make *de novo* fact findings, but instead simply addressed its ability to review a complete record.

In the second case cited by the majority, *Cahill*, Justice Black in dissent said:

> We have never held that in every instance where the Court of Appeals has failed to decide a point, we must remand the cause to that Court.

Id. at 188, 76 S.Ct. at 761. This statement lends no support to the majority's actions, for it simply speaks to the relation of the Supreme Court to a court of appeals. In *Cahill*, both courts concerned were appellate courts, while here we are dealing with an appellate court and a court of original jurisdiction. The majority's action in this case, however, turns this court, an appellate court, into an initial fact-finding body like a trial court.

Even if the majority's action is proper, its failure to remand the case to the Claims Court is certainly neither necessary nor desirable in the present case. The majority view precludes the trial judge from developing the record further, as he would have been empowered to do had the case been remanded. Further development of the record would have been appropriate in light of the new, broader issue to be resolved. By deciding the case now, on the present record, we have precluded the parties the full opportunity they're entitled to to develop their case. In addition, the majority's decision prevents the trial judge from making credibility judgments that only he, having observed the parties, is able to do. The majority claims the reason for its action is the length of time this case has been pending. This case, however, is not ended by the majority's ruling, since it is remanded for a trial on Count II of the petition. Thus the majority's rationalization of the unusual action it takes today appears dubious.

In the United States Court of Claims

TRIAL DIVISION

No. 519-78

(Filed: March 5, 1982)

SUSANNA BAGINSKY	)	Civilian pay; Veterans Administration; personnel regulations issued pursuant to statute with force and effect of law; proficiency report procedures; effect of failure to show, discuss and counsel with rated employee; additional requirements in case of "marginal" employee; reinstatement; correction of records.
	)	
	)	
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	)	
v.	)	
	)	
	)	
	)	
THE UNITED STATES	)	

Robert M. Buchanan, attorney of record for plaintiff. *Laura Steinberg, Sullivan & Worcester*, of counsel.

Lawrence S. Smith, with whom was *Acting Assistant Attorney General Stuart E. Schiffer*, for defendant.

OPINION*

SPECTOR, *Trial Judge*: The plaintiff, a physician specializing in pathology, was the Chief of Laboratory Services at the

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* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

Brockton, Massachusetts, Veterans Administration Hospital from April 15, 1973, until her removal from that position on May 19, 1975. In this action she seeks reinstatement to her former position, back pay, and related relief. Her amended petition[1] sets forth three counts. The first alleges a violation by the Veterans Administration of the requirements in its own Personnel Regulations Manual. Pursuant to the manual, plaintiff's supervisor, the hospital's Chief of Staff, prepared an annual proficiency report with respect to plaintiff dated April 15, 1974. As stated by this court in its prior order of October 19, 1979:

> The report gave plaintiff a *marginally* satisfactory rating and noted, "Desire for her retention is contingent upon a substantial improvement in her performance." [Emphasis supplied].

Plaintiff's first count is based on provisions of the manual which require that the April 15, 1974 proficiency report be shown to and discussed with the employee, and she alleges that the report was neither shown to nor discussed with her. This first count further cites the manual as mandating special counseling for a "marginal" employee, and she alleges that the required counseling was not provided either.

In the second count, plaintiff contends that she was thereafter denied due process in violation of the United States Constitution by a Professional Standards Board convened on March 7, 1975. The board concluded in a report dated April 2, 1975 that her performance was unsatisfactory. Plaintiff alleges that the board heard highly prejudicial and false

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[1] The case was originally filed in the U.S. District Court for the District of Massachusetts and thereafter transferred to this court.

charges which were never disclosed to her. The third count maintains that there was no substantial nor rational basis for her discharge.

Defendant moved for dismissal or for summary judgment, and the motion was denied by the court (except as to Count III) in the aforementioned order and opinion of October 19, 1979. With respect to Count I, the court found:

> • • • Paragraph 6.05 of the DM&S Supplement • • • provided that *before the end of an employee's first year of employment* "the rating official will discuss the content and conclusions of the report with the employee he has rated. Employees shall be permitted *to view the approved proficiency report* in the company of the rating official, approving official, or other professional-administrative supervisor having sufficient knowlege to discuss the rating with the employee." If a *marginal* or unsatisfactory report *was contemplated*, the provision further required a *counseling conference not later than 90 days prior to the due date* of the annual report. • • • [Emphasis supplied].
>
> • • • This is an important protection for the employee since it gives an opportunity to improve his work and avoid dismissal during the later part of the probationary period. • • • If the plaintiff can sustain her allegations, the government has violated its regulation.
>
> • • • We conclude that there is a sufficient relationship between the alleged violations in this case and the dismissal to sustain plaintiff's cause of action. The Manual at paragraph 4 of chapter 6 indicates that the purposes of the proficiency rating system include providing a basis for informing employees of their expected performance and advising them of the calibre of their work. The system evidently is intended in part to pro-

vide employees with an opportunity to correct any deficiencies in their performance. The failure of plaintiff to correct her deficiencies directly led to her dismissal. Had she been properly counseled and shown her poor proficiency report (and we indicate no views here on that question), she might have been able to improve her performance and avoid dismissal.

A remand to the Trial Division is therefore necessary *to determine whether plaintiff was shown her proficiency report dated April 15, 1974 at that time or given counselling as the Manual requires.* [Emphasis supplied].

The court also found it necessary to remand with respect to Count II, stating that it would be inappropriate to decide this issue without a further development of the facts, including all of the information that was before the board. At a pretrial conference of December 4, 1980, it was pointed out that if plaintiff prevailed on either Count I or Count II, that would be dispositive of the case. It was further observed that the issues raised by Count I could be resolved after a short trial, not exceeding 1 or 2 days, and with a minimum of testimony and documentary material, whereas trial of Count II on the Constitutional grounds asserted would require a much greater volume of testimony and documentary evidence. It was therefore suggested that Count I be tried first, but without prejudice to a later trial of Count II, if necessary. This suggestion was adopted.

The issue at this phase of the proceeding is, therefore, whether plaintiff was shown her April 15, 1974 proficiency report at the time of its preparation and given the counseling required by the applicable regulations of the Veterans Administration.

As noted earlier, the court order of October 19, 1979 refers to the annual proficiency report of April 15, 1974 as a "*mar-*

ginally satisfactory rating," (emphasis supplied) and further cites the regulations as requiring a counseling conference not later than 90 days prior to the due date of the annual report if "a *marginal* or unsatisfactory report was contemplated." (Emphasis supplied). The proficiency report is elsewhere referred to in the court's order as "poor." Defendant nevertheless urged at trial that it was not a marginal or poor proficiency report and that therefore the regulations do not require the prescribed counseling conference. It will therefore be necessary to explore the relationship which existed between plaintiff and her supervisor during the period of her employment, and to examine into whether she was regarded by her supervisor as "marginal".

Plaintiff's Professional Background

Plaintiff was born in 1912 in what was then a portion of the Austro-Hungarian Empire. She studied medicine and received her medical degree from the University of Prague in 1938. After practicing medicine continuously in Prague until 1946, she immigrated to this country and thereafter became a citizen of the United States. Plaintiff continued the practice of medicine in this country and was permanently licensed in Massachusetts, New York, and Connecticut. At the time of the events at issue, she was board certified in anatomic pathology and she has since become board certified in clinical pathology. Between 1946 and 1973, when she was employed at the Brockton V.A. Hospital, plaintiff was continuously in medical practice, in residency, or in training. Immediately prior to her employment at the hospital, plaintiff had been Chief of Laboratory Services at a hospital in Norwich, Connecticut, a job she left voluntarily because of the difficulty in commuting from her home in Massachusetts. During her several periods of residency, plaintiff also worked for a total of

5 years in other Veterans Administration hospitals. At the time of trial, her husband Rolf, also a physician, had been for a number of years a Chief of Service at the Bedford, Massachusetts Veterans Administration Medical Center.

Plaintiff's Employment at Brockton V.A. Hospital

In early 1973 Dr. John F. Conlin who was Chief of Staff at the Brockton, Massachusetts Veterans Administration Hospital, met plaintiff and interviewed her for the position of Chief of Laboratory Services. Dr. Conlin died prior to trial of this case and his pretrial testimony has been preserved in a deposition. A number of his papers are contained in other exhibits and were admitted into evidence. Dr. Conlin states in his deposition that plaintiff, who was accompanied by her husband Rolf, was late for her initial interview, that he found her an extremely difficult person to interview, and that he felt that she was not as directly responsive to his questions as he would have liked. He was surprised when plaintiff strongly objected to his seeking information about her from her most recent employer. Dr. Conlin nevertheless felt that, on balance, plaintiff would be suitable for the position of Chief of Laboratory Services. He forwarded the requisite information on plaintiff through customary channels for approval of her appointment. Among those whose approval was required was a Dr. William S. Maloney, a member of a Deans' Committee set up by area medical schools with which the hospital was affiliated. Dr. Maloney took issue with the proposed appointment and noted that plaintiff did not have the requisite qualifications for that level of responsibility. However, when other doctors provided favorable recommendations supporting plaintiff, Dr. Maloney withdrew his objection to her appointment and returned her papers with his approval.

Dr. Conlin's Opinion of Plaintiff

Dr. Conlin had initial misgivings concerning plaintiff as evidenced in a letter which he drafted in April 1973, but which he never sent to her. In the draft, he expressed his displeasure at her tardiness for the initial interview and at her objection to his obtaining information about her from her previous employer. At the bottom of the unsent letter he added the following parenthetical note to himself: "(I'm being had!)." In his deposition Dr. Conlin explained that he had written the unsent letter because of an impression that he was dealing with "a tremendous verbal push, an extremely difficult person to discuss with, to keep to an agenda." Although he did not mention it in his letter, he had also been disturbed by plaintiff's vigorous and forceful refusal to tour the laboratory and to meet her potential coworkers following her initial interview. Plaintiff received a probationary appointment as Chief of Laboratory Services and reported for duty on April 15, 1973, as instructed. She declined to submit to the 2 to 5 days of orientation which her supervisor had planned for her and as soon as routine personnel and payroll processing had taken place, Dr. Baginsky went right to the laboratory and began to work.

When she assumed her responsibilities as Chief of Laboratory Services at Brockton, plaintiff faced what Dr. Conlin acknowledged were some "difficult situations." The previous chief had become pregnant and resigned her position. A lengthy vacancy had followed and this created an administrative gap. The laboratory staff was divided into feuding groups, and various members of the staff were not on speaking terms with others. Several key employees had been considering retirement within the next 12 to 18 months. To make matters worse, the laboratory needed substantial improvement if it was to retain its accreditation.

Dr. Conlin stated in his deposition that plaintiff had an outspoken and direct manner. In his view this caused her to alienate some members of her staff. According to him, one of the earliest and most substantial sources of friction between plaintiff and her staff was her interest in hiring medical "technologists," college graduates with training to perform work in the laboratory. This was her suggestion for upgrading the quality of the Service. At that time most of the work in question was performed by "bench-trained technicians" who had gained their expertise by performing the work rather than by attending programs qualifying them to become technologists. In Dr. Conlin's view, the technicians feared that technologists would eventually replace them and they felt considerable antipathy toward plaintiff because of her suggestion. There is, in fact, no convincing evidence that plaintiff intended to force technicians out of their jobs in order to make room for technologists, nor to hire only technologists in the future. It appears that she merely wanted to add one more technologists to the staff in order to upgrade the laboratory over a period of time.

Dr. Conlin's reservations concerning plaintiff were so strong at this point that on April 23, 1973 he reviewed the unsent letter earlier mentioned and below the phrase "(I'm being had!)," he added another note: "(I've *been* had — Bill Maloney was right!)." (Emphasis in original). On April 26, 1973, he spoke with plaintiff about personality clashes within her Service and suggested that she delegate some of her authority to an experienced staff member who would act as a "coordinator." He also stated his opposition to her suggestion to hire technologists, and expressed his worry that plaintiff's suggestion would alienate the technicians. Finally, Dr. Conlin indicated that plaintiff had caused conflict with the Chief of Surgery and with the people in the personnel service, and he advised her to "[e]ase off" on them.

There is scant evidence regarding plaintiff's performance from April until October 1973. Dr. Conlin's only extended discussion with plaintiff during this time took place on August 28, 1973. Notes which he took on the routine business discussed, conclude with these cryptic comments: "— Told situation generally unsat & too much turmoil —? Approval in jeopardy unless square away — (specifics) —." Dr. Conlin's next extended discussion with plaintiff took place on October 23, 1973. His notes of that meeting reflect a growing dissatisfaction with plaintiff's performance as a Service Chief. They recite a "[g]eneral discussion of unsatisf. operations" and indicate his belief that plaintiff showed distrust of several of her staff members and that several staff members were "gone" or "going." This is a reference to the decision of several to retire or transfer from the Service, moves that Dr. Conlin attributed to plaintiff's "harassment" of her personnel and, apparently, to the "general atmosphere of uncertainty and of discontent" that he felt prevailed within the Service. The fact is that key employees were eligible to retire on the day plaintiff assumed her position and they had indicated to her at that time that they were planning to retire soon.

Dr. Conlin's notes of October 23, 1973, also indicate that "Personnel" was "extremely upset," and that there was a "need to upgrade and ride closer herd" over the Service since matters were "not going well as is." He refers to "gold cards" and "Blue Book," items in the administrative reporting systems for which plaintiff was ultimately responsible within her Service. Plaintiff's conflicts with the personnel service arose largely because of her purported shortcomings in meeting those and other paperwork requirements. Dr. Conlin was very concerned about what he regarded as plaintiff's abuse of her personnel. He noted in his deposition that, even in plaintiff's first days as a Service Chief, "there were ongoing frictions of substantial volume, tearful interviews: 'I can't put up with the interferences, the telephone calls to me at home at night.'"

He termed the Service "a very unhappy shop." As already noted, he felt that plaintiff's plan to hire medical technologists harmed the morale of technicians on her staff and when several of plaintiff's technical staff retired he attributed their departures to plaintiff's purported harassment of them. He also felt that plaintiff displayed favoritism, communicated poorly, and failed to conduct adequate meetings with her staff.

It is not at all clear that Dr. Conlin fully discussed the foregoing concerns with plaintiff or that he mentioned other concerns which he apparently considered important but which received little or no attention during the aforementioned discussions of April 26, August 28, and October 23, 1973. These concerns may not have seemed as serious to plaintiff as they did to him and as reflected in his private notes. Dr. Conlin was worried that the laboratory might lose its accreditation. He felt that "accrediting authorities had been overly kind in accepting promises and good will" in the past, and feared that plaintiff was failing to upgrade the laboratory to maintain its accreditation. Specifically, Dr. Conlin noticed what he considered to be unsafe conditions during his visits to the laboratory. He observed, for example, that laboratory personnel were using suction-aspiration pipettes instead of the safer, automatic pipettes as required by accreditation officials. He also felt that too much work that should have been done in the hospital was being sent to outside laboratories.

He also appeared to be upset about what he regarded as unnecessary delays in hiring personnel. When funds became available for the hiring of two additional laboratory technicians in connection with the opening of a new 60-bed addition to the hospital, for example, plaintiff seemingly took an inordinate time to hire them. In Dr. Conlin's words, she delayed "a month, two months, three months, four months." According to him, plaintiff had conflicts with the personnel service at

the hospital. Although there is evidence to indicate otherwise, the personnel service accused plaintiff of making excessive promises to job applicants. For example, it claimed that she had promised to hire one applicant for a specific position even though she could not do so until the personnel service approved the applicant. The personnel service maintained this position even though the evidence indicates that the interested applicant herself later denied such promises were made. As already mentioned, the personnel service complained that plaintiff failed to meet reporting requirements in a timely manner or to recruit personnel aggressively.

Whether or not Dr. Conlin's perceptions were well-founded, there is no evidence that between October 23, 1973 and March 28, 1974, he or anyone else in authority at the hospital had any extended discussion with plaintiff. As will later appear, it is especially significant that no such discussions took place in January of 1974.

The Early Brooks Matter

In late 1973 and early 1974, one of the most troubling affairs in plaintiff's tenure with the Brockton V.A. Hospital took place. It undoubtedly had an adverse impact upon the relationship between plaintiff and her supervisors and upon their evaluation of her. A vacancy had opened up for the only microbiologist position at the hospital. This employee is responsible for the operation of the Microbiology-Parasitology, Serology, and Blood Bank Sections of the Laboratory Service. It is a position of crucial importance to the lives and health of the patients. Of the eight or nine applicants, a Mr. Early Brooks appeared on paper to be clearly the best. Because of funding restrictions plaintiff was not permitted to personally interview Brooks, who lived in New Orleans, either there or at Brockton. Based on telephone conversations with him, on an

interview conducted by a V.A. official in New Orleans, and the resume and papers which Brooks had submitted with his application, plaintiff recommended him for the position. Both Dr. Conlin and a position classification specialist added their certifications on October 16, 1973.

Because of other obligations, Brooks did not report for duty until February 1974. Plaintiff put him to work on the day of his arrival and after close observation was obliged to recommend the next day that he be removed. She had found on meeting him personally that Brooks could not perform even routine tests properly, and that he lacked the basic professional and supervisory skills his position demanded. Since V.A. physicians relied on the incumbent of this position for information of the most vital importance, plaintiff felt that Brooks would have to be removed promptly to prevent irreparable injury to the lives and health of the hospital's patients. At trial plaintiff testified that in her opinion Brooks' negligence and lack of knowledge subsequently resulted in the death of at least two patients at Brockton. A check of his background revealed that he had misrepresented his credentials, and that he was not in fact qualified for the position as he had stated in his application and supporting papers. At the request of top hospital officials, Brooks resigned in May 1974.

Dr. James E. Baker, Director at Brockton, was Dr. Conlin's superior during the time of the Early Brooks matter. It was his testimony that he asked Mr. Brooks to stay to see if he could perform the work. This was despite the misrepresentation by Mr. Brooks of his credentials and his obvious lack of qualifications for the position. Dr. Conlin's concern with plaintiff in the Brooks matter was that she —

> didn't check him out until after he was aboard, and then she wanted immediate action. Then, of course, you are dealing now with a minority person, and I had a team

come in from the Boston VA Hospital to evaluate his credentials and performance such as they were.

Dr. Conlin assigned the entire blame for the Brooks matter to plaintiff, citing it as an example of her administrative deficiencies. In a discussion that took place on March 28, 1974, Dr. Conlin remarked that "none of this would have happened if you had done a proper job before you recommended the gentleman for employment." Dr. Conlin faulted plaintiff mainly because she had failed to verify Brooks' credentials before recommending his employment. Both Dr. Baker and Dr. Conlin complained that she had failed to give him the orientation they felt he deserved, but both failed to indicate how additional orientation would have led to a different result. The record shows that plaintiff shared hiring responsibilities with the personnel service and with the United States Civil Service Commission, and there is evidence that plaintiff did not clearly understand in advance that it was her sole responsibility to verify Brooks' professional credentials.

A V.A. review team blamed plaintiff for failing to conduct a face-to-face interview with Brooks prior to recommending him. As earlier noted, she had been denied the funds to interview him either at Brockton or New Orleans and there is no way she could have interviewed him face-to-face except at her expense. As above-stated, a face-to-face interview was conducted by a V.A. official in New Orleans.

At about the time of the Early Brooks matter, plaintiff's request for an authorized absence to attend at her own expense the Nineteenth International Congress of the German Medical Association for Continuing Medical Education in Badgastein, Austria, was denied. Dr. Conlin and Dr. Baker appear to

have been upset that they had previously approved plaintiff's attendance at her own expense at an International Congress of Neuropathology and Neurology in Barcelona, Spain. Despite their prior approval, Dr. Conlin later described plaintiff's attendance at the Barcelona conference as a "transparent device to provide a tax deductible basis for transoceanic travel to include visiting a family member in Scotland."

On April 8, 1974, there was a management review conference on the Service. Dr. Baker and his administrative assistant, and the assistant hospital director, and Dr. Conlin met with plaintiff. They conducted a "systematic internal review." Plaintiff submitted an annual report, and the other participants pointed out problems in the Service and offered suggestions on how best to deal with them. This type of review is conducted routinely with every Chief of Service once a year on a rotational basis, and without regard to whether a Service Chief's performance is satisfactory or unsatisfactory. Its review is in compliance with a different set of regulations than those at issue in this case. At issue here are those regulations governing proficiency ratings and personal counseling. The management review conferences, on the other hand, involve persons other than the Service Chief and supervisor, and the review is of the overall Service.

Dr. Conlin's notes of an April 11, 1974 meeting indicate that, along with the routine business discussed, there arose an accusation that plaintiff had made an unauthorized telephone call to a Dr. Marjory Williams, a long-time acquaintance of hers who worked at the V.A. Central Office in Washington, D.C. Plaintiff had purportedly asked for advice in the Brooks matter, and had complained that she was receiving no support from management. At first she apparently said that she had not made the call, but later admitted making it and termed it a "personal, unofficial" call that did not require advance clearance.

The April 15, 1974 Proficiency Report

On April 15, 1974, Dr. Conlin prepared an annual proficiency report evaluating plaintiff's performance during her first year at Brockton. Section B of the report form listed elements upon which the employee was to be rated. There was a rating scale of 1 through 8 for each element. Dr. Conlin assigned plaintiff a total numerical score of 52 points. To achieve a "satisfactory" score, plaintiff had to receive at least 39 out of a possible maximum of 88 points. Her numerical score was therefore technically "satisfactory." The only other classification was "unsatisfactory," which applied to any numerical score of 38 points or less. Based largely on what Dr. Conlin had told him, Dr. Baker concurred in the numerical score assigned to plaintiff.

Although plaintiff's score was technically within the range of "satisfactory," it was hardly an indication that her superiors were satisfied with her performance. Dr. Conlin himself later remarked that "based on a possible total score of 88 it is obvious that 52 was not a desirable rating." In fact, he would later admit that, although he had completed an average of approximately 50 proficiency ratings a year during his years as a V.A. supervisor, and although he had been evaluating employees for 7 years when he completed plaintiff's proficiency rating of April 15, 1974, he had never before given anyone a score of less than 60. His average scores in fact ranged from the "upper-sixties to the middle-seventies." In response to an interrogatory in this proceeding, Dr. Conlin commented that he "felt constrained to keep her total score within the range of 'Satisfactory' since I still had hopes we could bring Dr. Baginsky's performance up to an acceptable level."

Dr. Baker also testified that the "vast majority" of V.A. doctors received scores ranging from 65 to 75. Daniel F. Kennedy, Assistant Chief of the Personnel Service at Brockton,

had reviewed all proficiency ratings completed at Brockton for approximately 15 years. He testified that physicians' scores generally ranged "from the middle 60's to the middle 70's, with a few in the higher ranges." Dr. Rolf Baginsky, who as a Chief of Service at the Bedford, Massachusetts, V.A. Medical Center, had evaluated employees for approximately 18 years testified that he had never seen a score of less than 65, nor given a score of less than 70.

If the low numerical rating assigned by Dr. Conlin left any doubts about plaintiff's marginal and precarious position, they were removed by his narrative comments in section F of the report form. He first noted that "[a]t no time" during plaintiff's tenure had daily operations in her section "been conducted in a smoothly running fashion." Her main difficulty, he continued, was with personnel selection and administration. He complained that plaintiff was "garrulous, verbose, loquacious to a point where verbal communication with her is an ordeal and something less than effective." He added that "[a]dministratively she does not yet measure up to Chief of Service requirements," and "[p]rofessionally she seems at times to be uncertain or insecure and to need other opinion or backup excessively." His only positive comments were that plaintiff was "said to be a good teacher" and had performed well at clinical pathological conferences. Dr. Conlin concluded rather ominously that "[d]esire for her retention is contingent upon a substantial improvement in her performance." As noted earlier, based largely on what Dr. Conlin had told him, Dr. Baker concurred with Dr. Conlin's report.

As earlier stated, Dr. Conlin could have characterized plaintiff's performance in only one of two ways, *i.e.*, as either "satisfactory" or "unsatisfactory." The rating report form does not make provision for a supervisor to characterize an employee's performance as "marginal," nor do V.A. regulations in using that term define or otherwise specify what "marginal" means.

In addition to assigning the scores and making the comments already noted, Dr. Conlin evaluated plaintiff's capacity for advancement in section D of the rating report form. On a scale of 1 point to a maximum of 3 points, he placed plaintiff's capacity for professional advancement at 2 points, and her capacity for administrative advancement at 1 point.

The proficiency report contained the following question which is directly relevant to the issues in this case: "Have the strong and weak points rated under Section 'B' above been discussed with the individual at least 90 days in advance of this report?" Next to this question, Dr. Conlin checked a box indicating that the answer was "Yes." However, it is beyond dispute that plaintiff was not shown the report nor were the "strong and weak points" rated in section "B" discussed with her nor did she see the report either before or at the time it was prepared and approved. On the contrary, the evidence clearly shows that plaintiff did not see her proficiency report dated April 15, 1974 until May 16, 1975 at the very earliest. This date was 13 months after the proficiency report had been prepared and only 3 days before plaintiff's removal. She testified in fact that she did not see it until much later than May 16, 1975, namely, when it was produced in response to an FOIA request on August 16, 1976.

Contrary to his notation of "Yes" in section "B" of the report form, Dr. Conlin admits that he did not disclose its contents to plaintiff before its preparation in April 1974. Although he states it was his policy to discuss a rating with an employee during the 2-week period before the rating was to become effective, he clearly did not do so in this case. He attributed his failure to do so to plaintiff's purported unavailability during the first weeks of April. Plaintiff's testimony flatly contradicted Dr. Conlin's statement and, although Dr. Conlin had declared that plaintiff's leave records would verify his contention, those records were never produced in this proceeding.

The evidence further shows that Dr. Conlin himself, along with others, attended the "systematic internal review of the Service" on April 8 as earlier described and that he had a meeting with her on April 11, 1974 to discuss the earlier described telephone call to Dr. Williams in Washington. If plaintiff was available to meet with Dr. Conlin on those two occasions, it is obvious that she was not unavailable to meet with him privately to be shown her proficiency report and to afford him an opportunity to discuss it with her prior to April 15, 1974.

Dr. Conlin met with plaintiff on April 22, 1974. It is apparent that one of the purposes of the meeting was to discuss plaintiff's proficiency rating with her. Nevertheless, Dr. Conlin did not show plaintiff a copy of the rating report at that meeting, nor did he even have a copy of it himself. It is uncertain whether the rating was discussed at all. Plaintiff left the meeting unperturbed and unaware that her proficiency rating even existed. In fact even though the report itself was negative in every practical respect, Dr. Conlin's administrative assistant testified that plaintiff appeared happy and thanked Dr. Conlin as she left his office.

The evidence indicates that Dr. Conlin either did not discuss the proficiency report with plaintiff or discussed it in such an incomplete manner that the discussion did not adequately convey to plaintiff all the information she needed to understand her supposed shortcomings and to improve her performance thereafter. As a matter of fact, in a later memorandum dated April 23, 1974, Dr. Conlin acknowledges the inadequacy of the discussion of the previous day. He advises

plaintiff in that memorandum that he will "discuss your Proficiency Rating and other pertinent matters directly with you as soon as I am under a bit less pressure than right now." He did not in fact subsequently discuss plaintiff's proficiency rating with her at all.

In that memorandum to plaintiff of April 23, 1974, Dr. Conlin also touched very briefly on a number of the problems he had discussed with plaintiff during the prior year and concluded that "I am not at all satisfied with the current status administratively or professionally within your Service." He indicated that there would be a "review of various segments of the Laboratory and of Mr. Brooks."

Plaintiff thereafter responded in a memorandum of her own dated May 17, 1974. In defending herself against Dr. Conlin's statements she urged him not to make judgments based on "misunderstandings." As an indication that she did not know even then that her proficiency rating had already been prepared or that it existed, she concluded with the statement "[t]hey [the misunderstandings] should not be the basis of my Proficiency Rating you refer to in the last paragraph of the subject memorandum."

Subsequent Events

Subsequent events are not directly relevant to the issue here on remand. The issue as set forth in the court's order of October 19, 1979 is "whether plaintiff was shown her proficiency report dated April 15, 1974 at that time or given counselling as the Manual requires." Nevertheless, several documents subsequently prepared in late 1974 and early 1975 in connection

with her later removal shed light on the issue before us. They confirm that plaintiff's supervisors had regarded her as a marginal or unsatisfactory employee prior to the April 15, 1974 proficiency report.

On November 15, 1974, Dr. Baker sent the Veterans Administration Central Office in Washington, D.C., a document entitled "Proposed Separation from Employment of Susanna Baginsky, M.D.[,] Chief, Laboratory Service." It recounted the above-cited complaints of Dr. Conlin concerning plaintiff's performance during her first year at the hospital and added a few that had arisen in the meantime but which are not relevant here. The "Proposed Separation" noted in some detail the doubts that had arisen before plaintiff was hired. It commented that "[s]hortly after Dr. Baginsky's arrival on duty previous unrest on the Service increased to turmoil," and noted the retirement and departure of several Service employees. It referred to the Barcelona conference and noted that when she asked for approval in the summer of 1973 to attend the conference, she was informed that:

> [T]he situation on her Service was not satisfactory, that there was too much continuing turmoil and that our laboratory's recently received approval could well be placed in jeopardy unless there was substantial improvement.

The Proposed Separation also recalled the October 23, 1973 discussion, as follows:

> She was told of general dissatisfaction with her operations, the personnel situation, the general atmosphere of uncertainty, vacillation and discontent. There was immediate need to upgrade activities generally and to ride closer herd on day to day activities.

It went on to describe the situation as of January 21, 1974, when Dr. Conlin's administrative assistant interviewed various laboratory employees:

> Staff morale was low. There was concern over the three retirements or resignations which were regarded as attributable to Dr. Baginsky. There was lack of administrative leadership and of coordination and direction. There was refusal to make decisions, "to avoid upsetting anybody." Staff discussions were discouraged and there were threats to "get" anyone who discusses problems or presses for closure on issues.

The Proposed Separation also recounted plaintiff's purported tardiness in making her administrative reports, the disapproval of her request to attend the Badgastein conference, and the review of the Early Brooks matter in its early stages.

The April 15, 1974 proficiency report is specifically mentioned in the Proposed Separation. It noted that the report indicated that plaintiff's strong and weak points had been discussed with her at least 90 days in advance. This statement is, however, contrary to the record. The Proposed Separation states that the discussion had taken place about 5 weeks before the rating became effective. Apparently Dr. Baker read the regulation requiring a discussion "at least 90 days in advance" as meaning "within 90 days." Most significantly, the Proposed Separation also notes that "[*t*]*he report itself was not discussed directly with her.*" (Emphasis supplied).

The Proposed Separation spoke of an April 25, 1974 team review of the Early Brooks matter. The team, which had been sent by the Boston V.A. Hospital, found obvious errors in a report Brooks had prepared on unknown specimens. The review states:

> The team agreed that although he seemed to qualify from a reading of the Civil Service Commission material, he should not have been hired on that basis alone without face to face interview.

It is not mentioned, however, in the Proposed Separation that budget constraints had made it impossible for plaintiff to conduct a "face to face interview" with Brooks either in New Orleans or Brockton, and that she had been obliged to rely on an interview conducted by a V.A. official in New Orleans. The Proposed Separation also described the controversy over plaintiff's unauthorized telephone call to Dr. Williams in Washington. It further described events which took place between May and November 1974, but which are not relevant here.

On February 14, 1975, Dr. Conlin submitted a document entitled "Items for Professional Standards Board Review Concerning DR. SUSANNA BAGINSKY, Chief, Laboratory Service." It closely paralleled the Proposed Separation described above. It went on to clarify some of the details of the April 15, 1974 proficiency report.

> A numerical score of 52.0 was assigned with a rating of "satisfactory." However, based on a possible total score of 88 it is obvious that 52 was not a desirable rating. *It is, in fact, the lowest I had ever used, until then. The report as filed was not discussed directly with Dr. Baginsky,* but it is evident from items above listed that various areas of deficiency had been made known to her prior to the report. [Emphasis supplied].

On March 12, 1975, Dr. Conlin prepared a memorandum entitled "Comments on Various Items Presented to the Board

or Referred to from Various Sources." It was directed to the Professional Standards Board which was considering the proposed removal of plaintiff from her position. Dr. Conlin once again acknowledged that plaintiff had *not* been shown a copy of the April 15, 1974 proficiency report at the time that it was prepared. He also referred to:

> Item 41 on the Proficiency Report [which] asks "Have the strong and weak points rated under Section B above been discussed with the individual at least 90 days in advance of this report?" This was marked "yes", since at one time or another within the proper time limits items covered were discussed with her.

On May 19, 1975, plaintiff was removed from her position as Chief of Laboratory Services at the Brockton Veterans Administration Hospital.

Applicable Law and Regulations

The Administrator of the Veterans Administration is authorized to appoint physicians and other personnel necessary for the medical care of veterans.[2] Appointments are to be made without regard to civil service regulations, but they must instead conform to regulations which the Administrator is required to promulgate.[3] Appointments are probationary for a given period,[4] which was 3 years during the times relevant to this case. During the probationary period a review board, known as the "Professional Standards Board," may remove a

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[2] 38 U.S.C. § 4104.

[3] 38 U.S.C. § 4106(a).

[4] 38 U.S.C. § 4106(b).

probationary appointee who is found "not fully qualified and satisfactory."

In accordance with the relevant statutes, the Administrator of the Veterans Administration has promulgated regulations which have the force and effect of law.[5] The pertinent regulations in this case are found in Chapter 6 of the V.A. Manual, MP-5, part II, and in Chapter 6 of the DM&S Supplement, MP-5, part II. An introduction to the manual, MP-5, part II states specifically that "[t]he provisions of this part are regulatory, no deviations, not expressly authorized herein, to be indulged."

Chapter 6 of the manual deals with the V.A.'s proficiency rating system. As stated therein, proficiency ratings and the procedures associated with them have several important purposes. Among other things, they provide a basis for keeping employees informed of what is expected of them in their assignments, and for letting them know the level of their performance.[6] They also provide a basis for determining whether probationary appointments should be made permanent and as a basis for action in cases where service is unsatisfactory.[7]

Regular proficiency ratings must be made annually on the anniversary date of employment unless delayed for reasons specified within the regulations themselves.[8] An employee must be notified in writing as to the reasons for delay if a delay is contemplated.[9] A proficiency report must characterize an

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[5] *See Lodge 2424 International Association of Machinists v. United States*, 215 Ct. Cl. 125, 133, 564 F.2d 66 (1977).

[6] Manual, Ch. 6 at ¶¶ 4a and b.

[7] *Id.* at ¶¶ 4c. and g.

[8] *Id.* at ¶ 7a. (1).

[9] *Id.* at ¶ 7a. (2). A delay of the annual rating for as long as 90 days is permissible if an "unsatisfactory" rating is contemplated, and the employee has not received the required counseling, or there has been a failure to meet other procedural requirements.

employee's performance as either "satisfactory" or "unsatisfactory."[10] The regulations[11] further state that:

> The proficienoy rating system will provide for continuous counseling of employees by their supervisors as a regular method of communication between them and as a principal and positive means of accomplishing purposes of the program.

Chapter 6 of the DM&S Supplement, MP-5, part II, establishes the mechanics of the proficiency rating system. The rating official determines the employee's rating on a specified proficiency report form. The report must then be approved by an approving official who is the rating official's superior. After the rating has been approved the rating official must discuss the content and conclusions of the report with the employee rated. It is specifically provided[12] that:

> Employees shall be permitted to view the approved proficiency report in the company of the rating official, approving official, or other professional-administrative supervisor having sufficient knowledge to discuss the rating with the employee.

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[10] *Id.* at ¶¶ 7c. and d. A "satisfactory" rating results when the employee's proficiency meets or exceeds minimum performance levels in all elements of a given assignment, or when any inadequate proficiency or weak performance in any element or elements is compensated by proficiency or performance clearly exceeding minimum levels in other and more important aspects of the assignment. Otherwise, an "unsatisfactory" rating is assigned. The proficiency report is the basis for review by a Professional Standards Board evaluating a Proposed Separation. These regulatory requirements are also contained in Ch. 6 of the DM&S Supplement, part II, at ¶ 6.03c.

[11] *Id.* at ¶ 8.

[12] *Id.* at ¶ 6.05a.

The annual report is due on the anniversary date of employment. Employees must receive their first and subsequent ratings *within* the 90 days prior to the due date of the report.[13]

Counseling must ordinarily be conducted in connection with the proficiency rating system at least once a year, and it is particularly pertinent for employees "whose services have been deficient in any important element."[14]

The counseling program contemplates that "[s]upervisors will thoroughly review performance of their employees" and that "[c]are will be exercised for those in their probationary period."[15] The counseling is conducted in a so-called "counseling conference," which is informal and confidential and of such nature as to inform each employee, orally or in writing, of the manner in which the employee is performing or failing to perform assigned duties.[16] Supervisors are expected to commend strong qualities. They are also expected to discuss objectively an employee's weak points and furnish suggestions and advice for improvement.[17] On completion of the conference, the supervisor must make a written record of any weak points discussed and suggestions offered for improvement. This record must be "done by notation in sections F and/or G of the proficiency report form."[18]

Dr. Conlin's very negative comments in Section F have been set forth earlier in these findings, but as stated above they were not previously discussed with plaintiff in a counseling conference, nor was the proficiency report shown to her. Section G provides a space for similar comments by the approving official,

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[13] *Id.* at ¶ 6.05b.(1).

[14] *Id.* at ¶ 6.06 a.

[15] *Id.* at ¶ 6.06 b.(1).

[16] *Id.* at ¶ 6.06 c.(1).

[17] *Id.* at ¶ 6.06 c.(2).

[18] *Id.* at ¶ 6.06 c.(3).

in this case Dr. Baker. Section G simply contains a note that Dr. Baker concurs with Dr. Conlin's comments and rating. If the rating is satisfactory, the rating official must discuss the employee's rating with the employee as soon as possible after the approving official has returned the approved report, but *no later than the due date* of the annual report.[19]

The prescribed procedure is considerably different and more exacting where an employee's performance is not absolutely satisfactory. The regulations[20] provide that in that case:

> A counseling conference will be conducted for *marginal* or unsatisfactory employees *not later than 90 days prior* to the due date of the annual report. [Emphasis supplied].
>
> • • • • •
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> [A failure to improve within 30 to 60 days will,] depending on the circumstances, • • • be cause for *a second counseling conference*. [Emphasis supplied].[21]

After the second conference, the supervisor must prepare a memorandum indicating the reasons for the conference, the deficiencies at issue, and suggested solutions. The employee must initial the memorandum, a copy of which is given to him. If the employee still fails to show sufficient improvement, an unsatisfactory rating is assigned to the employee.[22]

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[19] *Id.* at ¶ 6.06 d.

[20] *Id.* at ¶6.06 e.; *see also* ¶ 6.05 c.(5).

[21] *Id.* at ¶ 6.06 e.(2).

[22] *Id.* at ¶ 6.06 e.(3). *See also* the procedure for delaying a proficiency report, with written notice to the employee, as described in note 9 *supra*, and in ¶ 6.06 f.

OPINION

It is obvious from the record that throughout her tenure at the hospital, plaintiff was regarded by her supervisor as a marginal employee, at best. Within days of her initial employment, Dr. Conlin advised her of his dissatisfaction with her performance. During her first year at Brockton, both Drs. Conlin and Baker repeatedly told plaintiff that they were "dissatisfied" with the way she was doing her job, and they characterized her performance as "unsatisfactory." When Dr. Conlin prepared plaintiff's proficiency report on April 15, 1974, he assigned plaintiff a numerical score of 52, which was by any measure an unusually low and marginal score. It was 20 to 30 percent lower than the average scores assigned to the vast majority of V.A. physicians, and represented a lower score than Dr. Conlin or Dr. Rolf Baginsky had ever assigned or even seen. Dr. Conlin's narrative comments in section F of the report were almost totally negative, and left no doubt that in his opinion plaintiff's performance was far from satisfactory. His concluding comment was that "[d]esire for [plaintiff's] retention is contingent upon substantial improvement in her performance." Dr. Baker concurred. Under these circumstances, plaintiff's performance could at best be characterized as only marginal.

As a marginal employee, plaintiff was entitled to counseling *not later than 90 days before* her proficiency rating became effective on April 15, 1974. There is no evidence that plaintiff received counseling at any time during the month of January 1974. For that matter, between October 23, 1973 and March 28, 1974, there is no evidence that she was engaged in any extended discussion with her superiors which could be regarded as a counseling conference within the contemplation of the regulations relating to proficiency reports.

Moreover, plaintiff was not shown her annual proficiency report nor was it discussed with her nor was she counseled with respect to it on or about April 15, 1974 as the regulations require. In fact, plaintiff did not see the report before May 16, 1975, at the earliest, and a preponderance of the evidence supports a finding that she did not see it until August 16, 1976 in response to an FOIA request. Although plaintiff had several informal discussions with Dr. Conlin and Dr. Baker in the year ending April 15, 1974, these were not sufficient to constitute the specific counseling conference contemplated by the Veterans Administration regulations governing these procedures.

This is literally a case in which "the facts speak for themselves." The relevant regulations are based on statutes and clearly have the force and effect of law. They in fact provide within the regulations themselves that no deviations from them are permissible.[23] Moreover, they highlight their own importance in providing a basis for keeping employees informed of what is expected of them, and for determining how they are measuring up, and whether their probationary appointments will be made permanent.[24]

In this case we also have the prior order of the court on October 19, 1979 emphasizing that the regulations are —

> an important protection for the employee since it gives an opportunity to improve his work and avoid dismissal during the later part of the probationary period. • • • If the plaintiff can sustain her allegations, the government has violated its regulation.

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[23] See text at note 5 *supra*.

[24] See text at notes 6 and 7 *supra*.

> * * * We conclude that there is a sufficient relationship between the alleged violations in this case and the dismissal to sustain plaintiff's cause of action. * * * The system evidently is intended in part to provide employees with an opportunity to correct any deficiencies in their performance. The failure of plaintiff to correct her deficiencies directly led to her dismissal. Had she been properly counselled and shown her poor proficiency report (and we indicate no views here on that question), she might have been able to improve her performance and avoid dismissal.

Plaintiff has amply supported her allegations at trial. She was not shown her first annual proficiency report due on April 15, 1974. Although entitled to receive and to have it discussed with her prior to that date, she did not in fact even see it until at least 13 months later, and probably not before August 16, 1976.

Moreover, a confidential counseling conference is required in conjunction with *any* annual proficiency report, and it is stated to be particularly important for employees "whose services have been deficient in any important element." No counseling conference of the type contemplated by the regulations was provided in this instance.[25]

In addition, a great deal more was required in the case of an employee in plaintiff's position. There is overwhelming evidence that she was regarded and treated throughout her employment as a "marginal" employee.[26] The regulations made special provision for an employee who fit that description. In referring to "marginal *or* unsatisfactory employees" (emphasis

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[25] *See* text at notes 14-18 *supra*.

[26] *See* text at notes 20-21 *supra*.

supplied), it is obvious that the regulations are describing a level of performance which falls along the margin or border dividing a clearly "satisfactory" from a clearly "unsatisfactory" proficiency report. Otherwise the use of the words "marginal" *or* "unsatisfactory" would be repetitive and meaningless. "Marginal" clearly refers to an employee falling within the low satisfactory range and on this record plaintiff just as clearly fell within that range in the opinion of her supervisor. As such she was entitled to special counseling no later than January 15, 1974,[27] and if she failed to improve within 30 to 60 days, as her supervisor obviously believed, a second counseling conference was indicated. This was to be followed by preparation of a memorandum in which the supervisor set forth the reasons for the conference, the deficiencies at issue, and suggested solutions. The employee was then to initial the memorandum and be given a copy.

None of this was done. In fact, the regulations do not appear to have been followed in any material respect.

Lawfully prescribed regulations, rules and procedures issued by a Government official or agency are binding upon the Government as well as upon its citizens.[28] Where an agency sets out prescribed procedures to govern its personnel matters, it must adhere to those procedures and a defect therein renders an adverse personnel action void *ab initio*.[29] Separations made in a manner not conforming with the requirements of a valid regulation are not lawful.[30]

Plaintiff is entitled to recover monetary damages equal to the compensation she would have received had she not been

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[27] That is, at least 90 days before the due date of her annual proficiency report.

[28] *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974); *Whelan* v. *United States*, 208 Ct. Cl. 688, 694, 529 F.2d 1000 (1976).

[29] *Jones* v. *United States*, 203 Ct. Cl. 544, 550 (1974).

[30] *Fletcher* v. *United States*, 183 Ct. Cl. 1, 8; 392 F.2d 266 (1968).

terminated, and judgment is entered to that effect.[31] The amount of recovery is reserved for further proceedings under Rule 131(c). In addition, to provide an entire remedy and to complete the relief afforded by this judgment, it is ordered that plaintiff be restored to her position and that applicable records be corrected to reflect this judgment and order.[32]

FINDINGS OF FACT

Introduction

1. Plaintiff Susanna Baginsky, a physician specializing in pathology, was the Chief of Laboratory Services at the Brockton, Massachusetts, Veterans Administration Hospital from April 15, 1973, until her removal from that position on May 19, 1975. In this action she seeks reinstatement to her former position, back pay, and related relief.

2. Plaintiff's amended petition sets forth three counts. The first alleges a violation by the Veterans Administration of the requirements in its own Personnel Regulations Manual. Pursuant to the manual, plaintiff's supervisor, the hospital's Chief of Staff, prepared an annual proficiency report with respect to plaintiff dated April 15, 1974. As stated by the court in its prior order of October 19, 1979:

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[31] *See* and *cf. Power* v. *United States*, 209 Ct. Cl. 126, 531 F.2d 505 (1976) and 210 Ct. Cl. 742 (1976); *Ainsworth* v. *United States*, 180 Ct. Cl. 166 (1967); *Urbina* v. *United States*, 180 Ct. Cl. 194 (1967); *Greenway* v. *United States*, 163 Ct. Cl. 72, 175 F.2d 330 (1963); *Mayer* v. *United States*, 145 Ct. Cl. 181 (1959); and *Newman* v. *United States*, 143 Ct. Cl. 784 (1958).

[32] *See* 28 U.S.C. § 1491, *as amended* Aug. 29, 1972, Pub. L. 92-415, § 1, 86 Stat. 652.

> The report gave plaintiff a marginally satisfactory rating and noted, "Desire for her retention is contingent upon a substantial improvement in her performance."

Plaintiff's first count cites the manual which requires that the April 15, 1974 proficiency report be shown to and discussed with the employee, and alleges that the report was neither shown to nor discussed with her. This count further cites the manual as mandating special counseling for a "marginal" employee, and alleges that the required counseling was not provided.

3. The second count contends that thereafter plaintiff was denied due process in violation of the United States Constitution by a Professional Standards Board convened on March 7, 1975. The board concluded in a report dated April 2, 1975 that her performance was unsatisfactory. Plaintiff alleges that the board heard highly prejudicial and false charges which were never disclosed to her.

4. In the third count, plaintiff maintains that there was no substantial nor rational basis for her discharge.

5. Defendant moved for dismissal or for summary judgment, and the motion was denied by the court (except as to Count III) in the aforementioned order and opinion of October 19, 1979. With respect to Count I, the court found:

> Paragraph 6.05 of the DM&S Supplement * * * provided that before the end of an employee's first year of employment "the rating official will discuss the content and conclusions of the report with the employee he has rated. Employees shall be permitted to view the approved proficiency report in the company of the rating official, approving official, or other professional-administrative supervisor having sufficient knowledge to discuss the rat-

ing with the employee." If a marginal or unsatisfactory report was contemplated, the provision further required a counseling conference not later than 90 days prior to the due date of the annual report. * * *

* * * This is an important protection for the employee since it gives an opportunity to improve his work and avoid dismissal during the later part of the probationary period. * * * If the plaintiff can sustain her allegations, the government has violated its regulation. * * *

We conclude that there is a sufficient relationship between the alleged violation in this case and the dismissal to sustain plaintiff's cause of action. The Manual at paragraph 4 of chapter 6 indicates that the purposes of the proficiency rating system include providing a basis for informing employees of their expected performance and advising them of the calibre of their work. The system evidently is intended in part to provide employees with an opportunity to correct any deficiencies in their performance. The failure of plaintiff to correct her deficiencies directly led to her dismissal. Had she been properly counseled and shown her poor proficiency report (and we indicate no views here on that question), she might have been able to improve her performance and avoid dismissal.

A remand to the Trial Division is therefore necessary to determine whether plaintiff was shown her proficiency report dated April 15, 1974 at that time or given counselling as the Manual requires.

6. With respect to Count II, the court also found it necessary to remand, stating that it would be inappropriate to decide this issue without further development of the facts, including all of the information that was before the board.

7. At a pretrial conference of December 4, 1980 it was pointed out that if plaintiff prevailed on either Count I or Count II, it would be dispositive of the case. It was further pointed out that the issues raised by Count I could be resolved after a short trial, not exceeding 1 or 2 days, with a minimum of testimony and documentary material, whereas trial of Count II on Constitutional grounds would require a much greater quantity of testimony and documentary evidence. It was therefore suggested that Count I be tried first, but without prejudice to a later trial of Count II, if required. This suggestion was adopted.

8. The issue at this phase of the proceeding is, therefore, whether plaintiff was shown her April 15, 1974 proficiency report at the time of its preparation and given the counseling required by the applicable regulations of the Veterans Administration.

9. As noted above in finding 2, the aforementioned court order of October 19, 1979 refers to the annual proficiency report of April 15, 1974 as a "marginally satisfactory rating," and further cites the regulations as requiring a counseling conference not later than 90 days prior to the due date of the annual report if "a marginal or unsatisfactory report was contemplated." The proficiency report is elsewhere referred to in the court's order as "poor." Defendant nevertheless urged at trial that it was not a marginal or poor proficiency report and therefore the regulations did not require the counseling conference. It will therefore be necessary to explore the relationship which existed between plaintiff and her supervisor during the period of her employment, and to examine into whether she was regarded by her supervisor as marginal.

Plaintiff's Professional Background

10. Plaintiff was born in 1912 in what was then a portion of the Austro-Hungarian Empire. She studied medicine and re-

ceived her medical degree from the University of Prague in 1938. After practicing medicine continuously in Prague until 1946, she immigrated to this country, and thereafter became a citizen of the United States.

11. Plaintiff continued the practice of medicine in this country and was permanently licensed in Massachusetts, New York, and Connecticut. At the time of the events at issue, she was board certified in anatomic pathology and she has since become board certified in clinical pathology.

12. Between 1946 and 1973, when she was employed at the Brockton V.A. Hospital, plaintiff was continually in medical practice, in residency or in training. Immediately prior to her employment at the hospital, plaintiff had been Chief of Laboratory Services at a hospital in Norwich, Connecticut, a job she left voluntarily because of the difficulty in commuting from her home in Massachusetts. During her several periods of residency, plaintiff also worked for a total of 5 years in other Veterans Administration hospitals. At the time of trial, her husband Rolf, also a physician, had been for a number of years a chief of service at the Bedford, Massachusetts Veterans Administration Medical Center.

Plaintiff's Employment at Brockton V.A. Hospital

13. In early 1973 Dr. John F. Conlin, Chief of Staff at the Brockton, Massachusetts Veterans Administration Hospital, met plaintiff and interviewed her for the position of Chief of Laboratory Services. Dr. Conlin died prior to trial of this case and his pretrial testimony has been preserved in a deposition. A number of his papers are contained in other exhibits admitted into evidence. Dr. Conlin states that plaintiff, who was accompanied by her husband Rolf, was late for her initial interview, that he found her an extremely difficult person to interview, and that he felt that she was not as directly responsive

to his questions as he would have liked. He was surprised when plaintiff strongly objected to his seeking information about her from her most recent employer. Dr. Conlin nevertheless felt that, on balance, plaintiff would be suitable for the position of Chief of Laboratory Services.

14. Dr. Conlin forwarded this information on plaintiff through customary channels for approval of her appointment. Among the persons whose approval was required was a Dr. William S. Maloney, a member of a Deans' Committee set up by area medical schools with which the hospital was affiliated. Dr. Maloney took issue with the proposed appointment and noted that, according to his sources, plaintiff did not have qualifications for the level of responsibility required of a chief of service. However, when other doctors provided favorable recommendations supporting plaintiff, Dr. Maloney withdrew his objection to her appointment and returned her papers with his approval.

Dr. Conlin's Opinion of Plaintiff

15. Dr. Conlin had initial misgivings about plaintiff as evidenced in a letter which he drafted in April 1973, but never sent to her. In the draft, he expressed his displeasure at her tardiness for the initial interview and at her objection to his obtaining information about her from her previous employer. At the bottom of the unsent letter he added the following parenthetical note to himself: "(I'm being had!)."

16. In his deposition Dr. Conlin explained that he had written the unsent letter because of his impression that he was dealing with "a tremendous verbal push, an extremely difficult person to discuss with, to keep to an agenda." Although he did not mention it in his letter, he had also been disturbed by plaintiff's vigorous and forceful refusal to tour the laboratory and meet her potential co-workers following her initial interview.

17. Plaintiff received a probationary appointment as Chief of Laboratory Services and was instructed to report for duty on April 15, 1973, which she did. She declined to submit to the 2 to 5 days of orientation which her supervisor had planned for her and as soon as routine personnel and payroll processing had taken place, Dr. Baginsky went to the laboratory and began to work.

18. When plaintiff assumed her responsibilities as Chief of Laboratory Services at Brockton (hereinafter "Service") she faced what Dr. Conlin acknowledged were some "difficult situations." The previous chief had become pregnant and resigned her position. The lengthy vacancy had created an administrative gap. The laboratory staff was divided into feuding groups, and various members of the staff were not on speaking terms with other staff members. Several key employees had been considering retirement within the next 12 to 18 months. To make matters worse, the laboratory needed substantial improvement if it was to retain its accreditation.

19. Dr. Conlin stated in his deposition that plaintiff had an outspoken and direct manner. In his view this caused her to alienate some members of her staff. According to him, one of the earliest and most substantial sources of friction between plaintiff and her staff was her interest in hiring medical "technologists," college graduates with training to perform work in the laboratory. This was her suggestion for upgrading the quality of the Service. At that time most of the work in question was performed by "bench-trained technicians" who had gained their expertise by performing the work rather than by attending programs that would have qualified them to become technologists. In Dr. Conlin's view, the technicians feared that technologists would eventually replace them and they felt considerable antipathy toward plaintiff for suggesting that technologists be employed. There is, in fact, no convincing evidence that plaintiff intended to force technicians out of

their jobs in order to make room for technologists, nor to hire only technologists in the future. It appears that she wanted only to add one or more technologists to the staff in order to upgrade the laboratory over a period of time.

20. Dr. Conlin's reservations concerning plaintiff were so strong at this point that on April 23, 1973 he reviewed the unsent letter earlier mentioned and below the phrase "(I'm being had!)," he added another note: "(I've *been* had — Bill Maloney was right!)." (Emphasis in original).

21. On April 26, 1973, Dr. Conlin spoke with plaintiff about personality clashes within her Service and suggested that she delegate some of her authority to an experienced staff member who would act as a "coordinator." He also stated his opposition to her suggestion to hire technologists, and expressed his worry that plaintiff's suggestion would alienate technicians who had been with the Service for some time. Finally, Dr. Conlin indicated that plaintiff had caused conflict with the Chief of Surgery and with the people in the personnel service, and he advised her to "[e]ase off" on them.

22. There is scant evidence regarding plaintiff's performance from April until October 1973. Dr. Conlin's only extended discussion with plaintiff during this time took place on August 28, 1973. He took notes during the discussion. Following a recitation of routine business, Dr. Conlin's notes conclude with these cryptic comments: " — Told situation generally unsat & too much turmoil — Approval in jeopardy unless square away — (specifics) —."

23. Dr. Conlin's next extended discussion with plaintiff took place on October 23, 1973. His notes of that meeting reflect a growing dissatisfaction with plaintiff's performance as a Service Chief. They show that there was a "[g]eneral discussion of unsatisf. operations." They indicate his belief that plaintiff showed distrust of several of her staff members and that several staff members were "gone" or "going." This re-

ferred to the decision of several to retire or transfer from the Service, moves that Dr. Conlin attributed to plaintiff's "harassment" of her personnel and, apparently, to the "general atmosphere of uncertainty and of discontent" that he felt prevailed within the Service. The fact is that key employees were eligible to retire on the day plaintiff assumed her position and they had indicated to her at that time that they would be retiring soon.

24. Dr. Conlin's October 23 notes also indicate that "Personnel" was "extremely upset," and that there was a "need to upgrade and ride closer herd" over the Service since matters were "not going well as is." He refers to "gold cards" and "Blue Book," items in the administrative reporting systems for which plaintiff was ultimately responsible within her Service. Plaintiff's conflicts with the personnel service arose largely because of her purported shortcomings in meeting those and other paperwork requirements. Dr. Conlin was very concerned about what he regarded as plaintiff's abuse of her personnel. He noted in his deposition that, even in plaintiff's first days as a Service Chief, "there were ongoing frictions of substantial volume, tearful interviews: 'I can't put up with the interferences, the telephone calls to me at home at night.'" He termed the Service "a very unhappy shop." As already noted, he felt that plaintiff's plan to hire medical technologists harmed the morale of technicians on her staff and when several of plaintiff's technical staff retired he attributed their departures to plaintiff's purported harassment of them. He also felt that plaintiff displayed favoritism, communicated poorly, and failed to conduct adequate meetings with her staff.

25. It is not at all clear that Dr. Conlin fully discussed the foregoing concerns with plaintiff or other concerns which he apparently considered important but which received little or no attention during his aforementioned discussions with plaintiff on April 26, August 28, and October 23, 1973. These

additional concerns may not have seemed as serious to plaintiff as they did to him and as mentioned in his private notes.

Dr. Conlin worried that the laboratory might lose its accreditation. He felt that "accrediting authorities had been overly kind in accepting promises and good will" in the past, and feared that plaintiff was failing to upgrade the laboratory to maintain its accreditation. Specifically, Dr. Conlin noticed what he considered to be unsafe conditions during his visits to the laboratory. He observed, for example, that laboratory personnel were using suction-aspiration pipettes instead of safer, automatic pipettes, as required by accreditation officials. He also felt that too much work that should have been done in the laboratory was being sent to outside laboratories.

26. Dr. Conlin also appeared to be upset about what he regarded as unnecessary delays in hiring personnel. When funds became available for the hiring of two additional laboratory technicians in connection with the opening of a new 60-bed addition to the hospital, for example, plaintiff seemingly took an inordinate time to hire them. In Dr. Conlin's words, she delayed "a month, two months, three months, four months."

27. According to Dr. Conlin, plaintiff had conflicts with the personnel service at the hospital. Although there is evidence to indicate otherwise, the personnel service accused plaintiff of making excessive promises to job applicants. For example, it claimed that she had promised to hire one applicant for a specific position even though she could not do so until the personnel service approved the applicant. The personnel service maintained this position even though the evidence indicates that the interested applicant herself later disputed the accuracy of personnel's accusation. As already mentioned, the personnel service complained that plaintiff failed to meet reporting requirements in a timely manner or to recruit personnel aggressively.

28. Whether or not Dr. Conlin's perceptions were well-founded, there is no evidence that between October 23, 1973 and March 28, 1974, he or anyone else in authority at the hospital had any extended discussion with plaintiff. As will later appear, it is especially significant that no such discussions took place in January of 1974.

The Early Brooks Matter

29. In late 1973 and early 1974, one of the most troubling affairs in plaintiff's tenure with the Brockton V.A. Hospital took place. It undoubtedly had an adverse impact upon the relationship between plaintiff and her supervisors and upon their evaluation of her. A vacancy had opened up for the only microbiologist employed at this hospital. This employee would be responsible for the operation of the Microbiology-Parasitology, Serology, and Blood Bank Sections of the Laboratory Service. It was a position of crucial importance to the lives and health of patients at the hospital. Of the eight or nine applicants for the position, a Mr. Early Brooks appeared on paper to be clearly the best. Because of funding restrictions plaintiff was not permitted to personally interview Brooks, who lived in New Orleans. Based on telephone conversations with him, on an interview conducted by a V.A. official in New Orleans, and the resume and papers which Brooks had submitted with his application, plaintiff recommended him for the position. Dr. Conlin and a position classification specialist added their certifications on October 16, 1973.

30. Because of other obligations, Brooks did not report for duty until February 1974. Plaintiff put him to work on the day of his arrival and after close observation was obliged to recommend the next day that he be removed. She had found on meeting him personally that Brooks could not perform even routine tests properly, and that he lacked the basic professional

and supervisory skills his position demanded. Since V.A. physicians relied on the incumbent of this position for information of the most vital importance, plaintiff felt that Brooks would have to be removed promptly to prevent irreparable injury to the lives and health of the hospital's patients. At trial plaintiff testified that Brooks' negligence and lack of knowledge subsequently resulted in the death of at least two patients at Brockton. A check of his background revealed that he had misrepresented his credentials, and that he was not in fact qualified for the position as he had stated in his application and supporting papers. At the request of top hospital officials, Brooks resigned in May 1974.

31. Dr. James E. Baker, Director at Brockton, was Dr. Conlin's superior during the time of the Early Brooks matter. It was his testimony that he asked Mr. Brooks to stay to see if he could perform the work. This was despite the misrepresentation by Mr. Brooks of his credentials and his obvious lack of qualifications for the position.

32. Dr. Conlin's concern with plaintiff in the Brooks matter was that she —

> didn't check him out until after he was aboard, and then she wanted immediate action. Then, of course, you are dealing now with a minority person, and I had a team come in from the Boston VA Hospital to evaluate his credentials and performance such as they were.

Dr. Conlin assigned the entire blame for the Books matter to plaintiff, citing it as an example of her administrative deficiencies. In a discussion that took place on March 28, 1974, Dr. Conlin remarked that "none of this would have happened if you had done a proper job before you recommended the gentleman for employment." Dr. Conlin faulted plaintiff

mainly because she had failed to verify Brooks' credentials before recommending his employment, and both Dr. Baker and Dr. Conlin complained that she had failed to give him the orientation they felt he deserved, but they failed to indicate how additional orientation would have led to a different result. The record shows that plaintiff shared hiring responsibilities with the personnel service and with the United States Civil Service Commission, and there is evidence that plaintiff did not clearly understand in advance that it was her responsibility to verify Brooks' professional credentials. A V.A. review team blamed plaintiff for failing to conduct a face-to-face interview with Brooks prior to recommending him. As earlier noted, she had been denied the funds to interview him either at Brockton or New Orleans and there is no way she could have interviewed him face-to-face. As above-stated, a face-to-face interview was conducted by a V.A. official in New Orleans.

33. At about the time of the Early Brooks matter, plaintiff's request for an authorized absence to attend at her own expense the Nineteenth International Congress of the German Medical Association for Continuing Medical Education in Badgastein, Austria, was denied. Dr. Conlin and Dr. Baker appear to have been upset that they had previously approved plaintiff's attendance at her own expense at an International Congress of Neuropathology and Neurology in Barcelona, Spain. Despite their prior approval, Dr. Conlin later described plaintiff's attendance at the Barcelona conference as a "transparent device to provide a tax deductible basis for transoceanic travel to include visiting a family member in Scotland."

34. On April 8, 1974, there was a management review conference on the Service. Dr. Baker and his administrative assistant, and the assistant hospital director, and Dr. Conlin met with plaintiff. They conducted a "systematic internal review." Plaintiff submitted an annual report, and the other

participants pointed out problems in the Service and offered suggestions on how best to deal with them. This type of review is conducted routinely with each chief of service once a year on a rotational basis, and without regard to whether a chief's performance is satisfactory or unsatisfactory. It complied with a different set of regulations than those at issue in this case, namely, those governing proficiency ratings and personal counseling. At the management review conferences persons other than the Service Chief and supervisor are present and the review is of the overall Service.

35. Dr. Conlin's notes of an April 11, 1974 meeting indicate that, along with the routine business discussed there arose an accusation that plaintiff had made an unauthorized telephone call to a Dr. Marjory Williams, a long-time acquaintance of hers who worked at the V.A. Central Office in Washington, D.C. Plaintiff had purportedly asked for advice in the Brooks matter, and had complained that she was receiving no support from management. At first she apparently said that she had not made the call, but later admitted making it and termed it a "personal, unofficial" call that did not require advance clearance.

The April 15, 1974 Proficiency Report

36. On April 15, 1974, Dr. Conlin prepared an annual proficiency report evaluating plaintiff's performance during her first year at Brockton. Section B of the report form listed elements upon which the employee was to be rated. There was a rating scale of 1 through 8 for each element. Dr. Conlin assigned plaintiff a total numerical score of 52 points. To achieve a "satisfactory" score, plaintiff had to receive at least 39 out of a possible maximum of 88 points. Plaintiff's score was therefore technically "satisfactory." The only other classification was "unsatisfactory," which applied to any score

of 38 points or less. Based largely on what Dr. Conlin had told him, Dr. Baker concurred in the numerical score assigned to plaintiff.

37. Although plaintiff's score was technically in the range of "satisfactory," it was hardly an indication that her superiors were satisfied with her performance. Dr. Conlin himself later remarked that "based on a possible total score of 88 it is obvious that 52 was not a desirable rating." In fact, he would later admit that, although he had completed an average of approximately 50 proficiency ratings a year during his years as a V.A. supervisor, and although he had been evaluating employees for 7 years when he completed plaintiff's proficiency rating of April 15, 1974, he had never before given anyone a score of less than 60. His average scores in fact ranged from the "upper-sixties to the middle-seventies." In response to an interrogatory in this proceeding, Dr. Conlin commented that he "felt constrained to keep the total score within the range of 'Satisfactory' since I still had hopes we could bring Dr. Baginsky's performance up to an acceptable level."

Dr. Baker testified that the "vast majority" of V.A. doctors received scores ranging from 65 to 75. Daniel F. Kennedy, Assistant Chief of the Personnel Service at Brockton, had reviewed all proficiency ratings completed at Brockton for approximately 15 years. He testified that physicians' scores generally ranged "from the middle 60's to the middle 70's, with a few in the higher ranges." Dr. Rolf Baginsky, who as a Chief of Service at the Bedford, Massachusetts, V.A. Medical Center, had evaluated employees for approximately 18 years testified that he had never seen a score of less than 65, nor given a score of less than 70.

38. If the numerical rating left any doubts about plaintiff's marginal and precarious position, they were removed by Dr. Conlin's narrative comments in section F of the report form. He first noted that "[a]t no time" during plaintiff's tenure had

daily operations in her section "been conducted in a smoothly running fashion." Her main difficulty, he continued, was with personnel selection and administration. He complained that plaintiff was "garrulous, verbose, loquacious to a point where verbal communication with her is an ordeal and something less than effective." He added that "[a]dministratively she does not yet measure up to Chief of Service requirements," and "[p]rofessionally she seems at times to be uncertain or insecure and to need other opinion or backup excessively." His only positive comments were that plaintiff was "said to be a good teacher" and had performed well at clinical pathological conferences. Dr. Conlin concluded rather ominously that "[d]esire for her retention is contingent upon a substantial improvement in her performance." As noted earlier, based largely on what Dr. Conlin had told him, Dr. Baker concurred with Dr. Conlin's proficiency report.

Dr. Conlin could have characterized plaintiff's performance in only one of two ways, *i.e.*, as either "satisfactory" or "unsatisfactory." The rating report form does not make provisions for him to characterize plaintiff's performance as "marginal," nor do V.A. regulations in using the term define or otherwise specify what "marginal" means.

39. In addition to assigning the scores and making the comments already noted, Dr. Conlin evaluated plaintiff's capacity for advancement in section D of the rating report form. On a scale of 1 point to a maximum of 3 points, Dr. Conlin placed plaintiff's capacity for professional advancement at 2 points, and her capacity for administrative advancement at 1 point.

40. The proficiency report contained the following question which is directly relevant to the issues in this case: "Have the strong and weak points rated under Section 'B' above been discussed with the individual at least 90 days in advance of this report?" Next to this question, Dr. Conlin checked a box indicating that the answer was "Yes." However, it is beyond

dispute that plaintiff was not shown the report nor was it discussed with her nor did she see it either before or at the time it was prepared and approved. On the contrary, the evidence clearly shows that plaintiff did not see her proficiency report dated April 15, 1974 until May 16, 1975 at the very earliest. This date was 13 months after the proficiency report had been prepared and only 3 days before plaintiff's removal. She testified in fact that she did not see it until much later than May 16, 1975, namely when it was produced in response to an FOIA request on August 16, 1976.

41. Contrary to his notation of "Yes" in section "B" of the report form, Dr. Conlin admits that he did not disclose its contents to plaintiff before its preparation in April 1974. Although he states it was his policy to discuss a rating with an employee during the 2-week period before the rating was to become effective, he clearly did not do so in this case. He attributed his failure to do so to plaintiff's purported unavailability during the first weeks of April. Plaintiff's testimony flatly contradicted Dr. Conlin's statement and, although Dr. Conlin had declared that plaintiff's leave records would verify his contention, those records were never produced in this proceeding. The evidence further shows that Dr. Conlin himself, along with others, attended the "systematic internal review of the Service" earlier described on April 8, and that he had a meeting with her on April 11, 1974 to discuss the earlier described telephone call to Dr. Williams in Washington. If plaintiff was available to meet with Dr. Conlin on those two occasions, it is obvious that she was not unavailable to meet with him privately to be shown her proficiency report and to afford him an opportunity to discuss it with her prior to April 15, 1974.

42. Dr. Conlin met with plaintiff on April 22, 1974. It is apparent that one of the purposes of the meeting was to discuss plaintiff's proficiency rating with her. Nevertheless, Dr. Con-

lin did not show plaintiff a copy of the rating report at that meeting, nor did he even have a copy of it himself. It is uncertain whether the rating was discussed at all. Plaintiff left the meeting unperturbed and unaware that her proficiency rating even existed. In fact even though the report itself was negative in every practical respect, Dr. Conlin's administrative assistant testified that plaintiff appeared happy and thanked Dr. Conlin as she left his office. The evidence indicates that Dr. Conlin either did not discuss the proficiency report with plaintiff or discussed it in such an incomplete manner that the discussion did not adequately convey to plaintiff all the information she needed to understand her supposed shortcomings and to improve her performance thereafter. As a matter of fact, in a later memorandum dated April 23, 1974, Dr. Conlin acknowledges the inadequacy of the discussion of the previous day. He advises plaintiff in that memorandum that he will "discuss your Proficiency Rating and other pertinent matters directly with you as soon as I am under a bit less pressure than right now." Dr. Conlin did not in fact subsequently discuss plaintiff's proficiency rating with her at all.

43. In that memorandum to plaintiff of April 23, 1974, Dr. Conlin also touched very briefly on a number of the problems he had discussed with plaintiff during the prior year and concluded that "I am not at all satisfied with the current status administratively or professionally within your Service." Dr. Conlin indicated that there would be a "review of various segments of the Laboratory and of Mr. Brooks."

44. Plaintiff responded in a memorandum of her own on May 17, 1974. In defending herself against Dr. Conlin's statements she urged him not to make judgments based on "misunderstandings." Showing that she did not know even then that her proficiency rating had already been prepared or that it existed, she concluded with the statement "[t]hey [the misunderstandings] should not be the basis of my Proficiency Rating

you refer to in the last paragraph of the subject memorandum."

Subsequent Events

45. Subsequent events are not directly relevant to the issue here on remand. The issue as set forth in the court's order of October 19, 1979 is "whether plaintiff was shown her proficiency report dated April 15, 1974 at that time or given counselling as the Manual requires." However, several documents subsequently prepared in late 1974 and early 1975 in connection with her later removal shed light on the above-stated issue. They confirm that plaintiff's supervisors had regarded her as a marginal or unsatisfactory employee prior to the April 15, 1974 proficiency report.

46. On November 15, 1974, Dr. Baker sent the Veterans Administration Central Office in Washington, D.C., a document entitled "Proposed Separation from Employment of Susanna Baginsky, M.D.[,] Chief, Laboratory Service." It recounted the above-cited complaints of Dr. Conlin concerning plaintiff's performance during her first year at the hospital and added a few that had arisen in the meantime but which are not relevant here. It noted in some detail the doubts that arose before plaintiff was hired. It commented that "[s]hortly after Dr. Baginsky's arrival on duty previous unrest on the Service increased to turmoil," and noted the retirement and departure of several Service employees. It referred to the Barcelona conference and noted that when she asked for approval in the summer of 1973 to attend the conference, she was informed that:

> [T]he situation on her Service was not satisfactory, that there was too much continuing turmoil and that our laboratory's recently received approval could well be placed in jeopardy unless there was substantial improvement.

47. The Proposed Separation also recalled the October 23, 1973 discussion, as follows:

> She was told of general dissatisfaction with her operations, the personnel situation, the general atmosphere of uncertainty, vacillation and discontent. There was immediate need to upgrade activities generally and to ride closer herd on day to day activities.

It went on to describe the situation as of January 21, 1974, when Dr. Conlin's administrative assistant interviewed various laboratory employees:

> Staff morale was low. There was concern over the three retirements or resignations which were regarded as attributable to Dr. Baginsky. There was lack of administrative leadership and of coordination and direction. There was refusal to make decisions, "to avoid upsetting anybody." Staff discussions were discouraged and there were threats to "get" anyone who discusses problems or presses for closure on issues.

The Proposed Separation also recounted plaintiff's purported tardiness in making her administrative reports, the disapproval of her request to attend the Badgastein conference, and the review of the Early Brooks matter in its early stages.

48. The Proposed Separation next mentioned specifically the April 15, 1974 proficiency report. It noted that the report indicated that plaintiff's strong and weak points had been discussed with her at least 90 days in advance. This statement is not supported by the record. The Proposed Separation states that the discussion had taken place about 5 weeks before

the rating became effective. Apparently Dr. Baker read the regulation requiring a discussion "at least 90 days in advance" as meaning "within 90 days." Most significantly, the Proposed Separation also notes that "[t]he report itself was not discussed directly with her."

The Proposed Separation spoke of an April 25, 1974 team review of the Early Brooks matter. The team, which had been sent by the Boston V.A. Hospital, found obvious errors in a report Brooks had prepared on unknown sepcimens. The review states:

> The team agreed that although he seemed to qualify from a reading of the Civil Service Commission material, he should not have been hired on that basis alone without face to face interview.

The Proposed Separation fails to note, however, that budget constraints had made it impossible for plaintiff to conduct a "face to face interview" with Brooks, and that she had been obliged to rely on an interview conducted by a V.A. official in New Orleans. The Proposed Separation also described the controversy over plaintiff's unauthorized telephone call to Dr. Williams in Washington. It further described events which took place between May and November 1974, but which are not relevant here.

49. On February 14, 1975, Dr. Conlin submitted a document entitled "Items for Professional Standards Board Review Concerning DR. SUSANNA BAGINSKY, Chief, Laboratory Service." It closely paralleled the Proposed Separation described above. It went on to clarify some of the details of the April 15, 1974 proficiency report.

> A numerical score of 52.0 was assigned with a rating of "satisfactory." However, based on a possible total score

> of 88 it is obvious that 52 was not a desirable rating. It is, in fact, the lowest I had ever used, until then. The report as filed was not discussed directly with Dr. Baginsky, but it is evident from items above listed that various areas of deficiency had been made known to her prior to the report.

50. On March 12, 1975, Dr. Conlin prepared a memorandum entitled "Comments on Various Items Presented to the Board or Referred to from Various Sources." It was directed to the Professional Standards Board which was considering the proposed removal of plaintiff from her position. Dr. Conlin once again acknowledged that plaintiff had not been shown a copy of the April 15, 1974 proficiency report at the time that it was prepared. He also referred to:

> Item 41 on the Proficiency Report [which] asks "Have the strong and weak points rated under Section B above been discussed with the individual at least 90 days in advance of this report?" This was marked "yes", since at one time or another within the proper time limits items covered were discussed with her.

51. On May 19, 1975, plaintiff was removed from her position as Chief of Laboratory Services at the Brockton Veterans Administration Hospital.

Applicable Law and Regulations

52. Pursuant to 38 U.S.C. § 4104, the Administrator of the Veterans Administration is authorized to appoint physicians and other personnel necessary for the medical care of veterans.

A following section (38 U.S.C. § 4106(a)) provides that appointments are to be made without regard to civil service regulations, but they must instead conform to regulations which the Administrator is required to promulgate. Section 4106(b) of Title 38 provides that appointments are probationary for a given period, which was 3 years during the times relevant to this case. During the probationary period a review board, known as the "Professional Standards Board," may remove an appointee who is found "not fully qualified and satisfactory."

53. In accordance with the cited statutes, the Administrator of the Veterans Administration has promulgated regulations which have the force and effect of law. The pertinent regulations in this case are found in Chapter 6 of the V.A. Manual, MP-5, part II, and in Chapter 6 of the DM&S Supplement, MP-5, part II. An introduction to the manual, MP-5, part II states that "[t]he provisions of this part are regulatory, no deviations, not expressly authorized herein, to be indulged."

54. Chapter 6 of the manual describes the V.A.'s proficiency rating system. As stated therein, proficiency ratings and the procedures associated with them have several important purposes. Among other things, they provide a basis for keeping employees informed of what is expected of them in their assignments, and for letting them know the level of their performance. They also provide a basis for determining whether probationary appointments should be made permanent and as a basis for action in cases where service is unsatisfactory.

Regular proficiency ratings must be made annually on the anniversary date of employment unless delayed for reasons specified within the regulations themselves. An employee must be notified in writing as to the reasons for delay if a delay is contemplated. A proficiency report must characterize an

employee's performance as either "satisfactory" or "unsatisfactory." A "satisfactory" rating results when the employee's proficiency meets or exceeds minimum performance levels in all elements of a given assignment, or when any inadequate proficiency or weak performance in any element or elements is compensated by proficiency or performance clearly exceeding minimum levels in other and more important aspects of the assignment. An "unsatisfactory" rating results whenever the requirements for a satisfactory rating are not met. The proficiency rating is the basis for review of the employee's performance by the Professional Standards Board. The regulations further state that:

> The proficiency rating system will provide for continuous counseling of employees by their supervisors as a regular method of communication between them and as a principal and positive means of accomplishing purposes of the program.

55. Chapter 6 of the DM&S Supplement, MP-5, part II, establishes the mechanics of the proficiency rating system. The rating official determines the employee's rating on a specified proficiency report form. The report must then be approved by an approving official who is the rating official's superior. After the rating has been approved the rating official must discuss the content and conclusions of the report with the employee rated. It is specifically provided that:

> Employees shall be permitted to view the approved proficiency report in the company of the rating official, approving official, or other professional-administrative supervisor having sufficient knowledge to discuss the rating with the employee.

The annual report is due on the anniversary date of employment. Employees must receive their first and subsequent ratings within the 90 days prior to the due date of the report.

56. Counseling must ordinarily be conducted in connection with the proficiency rating system at least once a year, and it is particularly pertinent for employees "whose services have been deficient in any important element."

The counseling program contemplates that "[s]upervisors will thoroughly review performance of their employees" and that "[c]are will be exercised for those in their probationary period." The counseling is conducted in a "counseling conference," which is informal and confidential and of such nature as to inform each employee, orally or in writing, of the manner in which the employee is performing or failing to perform assigned duties. Supervisors are expected to commend strong qualities. They are also expected to discuss objectively an employee's weak points and furnish suggestions and advice for improvement. On completion of the conference, the supervisor must make a written record of any weak points discussed and suggestions offered for improvement. This record must be "done by notation in sections F and/or G of the proficiency report form." Dr. Conlin's very negative comments in section F have been set forth earlier in these findings, but as stated above they were not previously discussed with plaintiff in a counseling conference, nor was the proficiency report shown to her. Section G provides a space for similar comments by the approving official, in this case Dr. Baker. Section G simply contains a note that Dr. Baker concurs with Dr. Conlin's comments and rating. If the rating is satisfactory, the rating official must discuss the employee's rating with the employee as soon as possible after the approving official has returned the approved report, but no later than the due date of the annual report.

57. For employees whose performance is not absolutely satisfactory, however, the prescribed procedure is considerably different. The regulations provide that in that case:

> A counseling conference will be conducted for *marginal* or unsatisfactory employees not later than 90 days *prior* to the due date of the annual report. [Emphasis supplied].
>
> • • • • • • •
>
> [A failure to improve within 30 to 60 days will,] depending on the circumstances, • • • be cause for a second counseling conference.

After the second conference, the supervisor must prepare a memorandum indicating the reasons for the conference, the deficiencies at issue, and suggested solutions. The employee must initial the memorandum, a copy of which is given to him. If the employee still fails to show sufficient improvement, an unsatisfactory rating is assigned to the employee.

58. It is worth noting that there is a provision allowing a delay of the annual rating for as long as 90 days if an "unsatisfactory" rating is contemplated, and the employee has not received the required counseling or there has been a failure to meet other procedural requirements. But the employee must be advised in writing of the reasons for delay and during the period of the delay, the employee is to be counseled and then is to receive an annual rating at the end of the period.

Ultimate Findings

59. Throughout her tenure at the hospital, plaintiff was regarded by her supervisor as a marginal employee, at best.

Within days of her initial employment, Dr. Conlin advised her of his dissatisfaction with her performance. During her first year at Brockton, both Dr. Conlin and Dr. Baker repeatedly told plaintiff that they were "dissatisfied" with the way she was doing her job, and they characterized her performance as "unsatisfactory." When Dr. Conlin prepared plaintiff's proficiency report on April 15, 1974, he assigned plaintiff a numerical score of 52, which was by any measure an unusually low and marginally "satisfactory" score. It was 20 to 30 percent lower than the average scores assigned to the vast majority of V.A. physicians, and represented a lower score than Dr. Conlin or Dr. Rolf Baginsky had ever assigned or even seen. Dr. Conlin's comments in section F of the report were almost totally negative, and left no doubt that in his opinion plaintiff's performance was far from satisfactory. His concluding comment was that "[d]esire for [plaintiff's] retention is contingent upon substantial improvement in her performance." Dr. Baker concurred. Under these circumstances, plaintiff's performance could at best be characterized as only marginal.

60. As a marginal employee, plaintiff was entitled to counseling not later than 90 days before her proficiency rating became effective on April 15, 1974. There is no evidence that plaintiff received counseling at any time during the month of January 1974. For that matter, between October 23, 1973 and March 28, 1974, there is no evidence that she was engaged in any extended discussion with her superiors which could be regarded as a counseling conference within the contemplation of the regulations relating to proficiency reports.

61. Plaintiff was not shown her annual proficiency report nor was it discussed with her nor was she counseled with respect to it on or about April 15, 1974. In fact, plaintiff did not see the report before May 16, 1975, at the earliest, and a preponderance of the evidence supports a finding that she did

not see it until August 16, 1976 in response to an FOIA request. Although plaintiff had several informal discussions with Dr. Conlin and Dr. Baker in the year ending April 15, 1974, these were not sufficient to constitute the specific counseling conference contemplated by the Veterans Administration regulations governing these procedures.

CONCLUSION OF LAW

Upon the findings and foregoing opinion, which are adopted by the court, the court concludes as a matter of law that plaintiff is entitled to recover monetary damages equal to the compensation she would have received had she not been terminated, and judgment is entered to that effect. The amount of recovery is reserved for further proceedings under Rule 131(c).

In addition, to provide an entire remedy and to complete the relief afforded by this judgment, it is ordered that plaintiff be restored to her position and that applicable records be corrected to reflect this judgment and order.

COURT OF CLAIMS

No. 519-78. October 19, 1979

Susanna Baginsky

Civilian pay; dismissal; alleged agency violation of personnel regulations; due process requirements; Board's decision re credibility of witnesses.—On October 19, 1979 the court entered the following order:

Robert M. Buchanan, attorney of record for plaintiff. *Laura Steinberg* and *Sullivan & Worcester*, of counsel.

Lawrence S. Smith, with whom was *Acting Assistant Attorney General Stuart E. Schiffer*, for defendant.

Before FRIEDMAN, *Chief Judge*, KASHIWA and KUNZIG, *Judges*.

This civilian pay case arises out of the termination during the probation period of a physician's employment with the Veterans Administration. The plaintiff seeks reinstatement and back pay. The defendant has moved for dismissal or for summary judgment. We grant summary judgment on one count of the petition but otherwise deny the motion.

Plaintiff began employment on April 15, 1973, as Chief of Laboratory Services at the Veterans Administration Hospital in Brockton, Massachusetts. Under 38 U.S.C. § 4106(b) (1976), such appointments are subject to a probationary period of 3 years. The statute also provides for periodic review by a Professional Standards Board and for separation from service if, during the probationary period, the board finds a physician "not fully qualified and satisfactory."

Pursuant to the personnel regulations of the Veterans Administration set forth in paragraph 7.a(1), chapter 6, of its Manual, MP-5, part II, and in paragraph 6.05.b of the DM&S Supplement to the Manual, MP-5, part II, plaintiff's supervisor, the hospital's Chief of Staff, prepared an annual proficiency report with respect to plaintiff dated April 15, 1974. The report gave plaintiff a marginally satisfactory rating and noted, "Desire for her retention is contingent upon a substantial improvement in her performance." The parties disagree as to whether plaintiff was shown the report at that time. Plaintiff alleges that she never saw a copy of the report until it was disclosed under the Freedom of Information Act in August 1976.

On February 14, 1975, plaintiff's supervisor presented her with a document entitled "Items for Professional Standards Board Review Concerning DR. SUSANNA BAGINSKY, Chief, Laboratory Service." The document contains 33 numbered paragraphs describing various incidents which in the

supervisor's belief demonstrated plaintiff's unsuitability for her position. Plaintiff was given an unsatisfactory rating in a new proficiency report dated February 20, 1975, and a Professional Standards Board was convened on March 7, 1975. The board considered written and oral statements from various Veterans Administration employees. Plaintiff submitted a written statement in her defense but did not appear personally. In accordance with the Manual, paragraph 4.06.c of the DM&S Supplement, plaintiff was not present while other witnesses were questioned. The board concluded in a report dated April 2, 1975, that plaintiff's performance was unsatisfactory. Plaintiff's employment was terminated on May 19, 1975.

Plaintiff's amended petition[1] for reinstatement and back pay has three counts. First, plaintiff contends that the Veterans Administration violated requirements in the Manual. Her principal complaint involves the alleged failure of her supervisor to counsel her or to show her the proficiency report dated April 15, 1974.[2] Second, plaintiff contends that she was denied due process in violation of the fifth amendment to the United States Constitution because the Professional Standards Board allegedly heard highly prejudicial and false charges

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[1] Plaintiff has amended her petition to omit several named individuals as defendants and to omit a fourth count alleging unreasonable affliction of mental pain and suffering. Thus, defendant's motion for summary judgment on these issues is moot.

[2] Plaintiff also contends that under paragraph 9.03.b(2)(a) of the DM&S Supplement to the Manual, a separation such as plaintiff's must be approved by the Chief Medical Director and not his deputy. This argument overlooks paragraph 4.e of chapter 4 of the Manual, which provides that a separation of a probationary employee recommended by a Professional Standards Board can be approved by the Chief Medical Officer or his designee. Defendant has submitted satisfactory undisputed evidence to show that the deputy of the Chief Medical Officer was properly designated to perform this task.

never disclosed to plaintiff. Third, plaintiff maintains that there was no substantial or rational basis for her discharge.

With respect to the first count, defendant denies that plaintiff was not counseled or shown her proficiency report dated April 15, 1974. Defendant also contends that even if plaintiff's allegations were true, defendant is entitled to summary judgment as a matter of law. Defendant relies primarily on paragraph 4.05.b(3) of the DM&S Supplement, which provides:

> The steps necessary to separate deficient employees shall be initiated at any time during the probationary period that the need for such action becomes manifest. This is true, regardless of past or pending proficiency ratings, counseling, or the result of any previous review which served to evaluate performance during the probationary period.

Defendant interprets this provision as authorizing the termination of a probationary employee at any time whether or not the provisions governing counseling and disclosure of proficiency reports has been followed. We cannot agree with defendant's interpretation of this provision. It permits a probationary employee with previously satisfactory ratings to be given a new and unsatisfactory rating at any time and dismissed without further counseling. Paragraph 6.05 of the DM&S Supplement, however, provided that before the end of an employee's first year of employment "the rating official will discuss the content and conclusions of the report with the employee he has rated. Employees shall be permitted to view the approved proficiency report in the company of the rating official, approving official, or other professional-administrative supervisor having sufficient knowledge to discuss the rat-

ing with the employee." If a marginal or unsatisfactory report was contemplated, the provision further required a counseling conference not later than 90 days prior to the due date of the annual report.

Thus, although a probationary employee may be dismissed within his first year without either counseling or other indication that his performance is deficient, after completing one year of employment he is entitled to a discussion of his performance. This is an important protection for the employee since it gives an opportunity to improve his work and avoid dismissal during the later part of the probationary period. We do not read paragraph 4.05.b(3) as modifying this provision or permitting the government to ignore it. If the plaintiff can sustain her allegations, the government has violated its regulation.

Allegations that the dismissal proceeding involved a violation of a regulation that was not apparent on the record of that proceeding would present an issue of material fact requiring a trial. *Camero* v. *United States*, 170 Ct. Cl. 490, 345 F.2d 798 (1965); *see also Vitarelli* v. *Seaton*, 356 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957). This case is unusual in that the dismissal proceeding itself apparently was conducted in compliance with all applicable regulations, and the claim is that there were earlier violations of a regulation which tainted the dismissal. We conclude that there is a sufficient relationship between the alleged violations in this case and the dismissal to sustain plaintiff's cause of action. The Manual at paragraph 4 of chapter 6 indicates that the purposes of the proficiency rating system include providing a basis for informing employees of their expected performance and advising them of the calibre of their work. The system evidently is intended in part to provide employees with an opportunity to correct any deficiencies in their performance. The failure of plaintiff to correct her deficiencies directly led to her dismissal.

Had she been properly counselled and shown her poor proficiency report (and we indicate no views here on that question), she might have been able to improve her performance and avoid dismissal.

A remand to the Trial Division is therefore necessary to determine whether plaintiff was shown her proficiency report dated April 15, 1974 at that time or given counselling as the Manual requires.

A remand is also necessary with respect to plaintiff's second count. Plaintiff alleges that the Professional Standards Board received evidence on false charges to which she had no opportunity to respond. At least one item that the board stated it considered — a petition of grievance signed by six subordinate employees against plaintiff — has not been submitted to the court in support of defendant's motion for summary judgment. Plaintiff also alleges that she has been denied due process because disclosure of the false and unrebutted charges made to the board would seriously stigmatize plaintiff and diminish her employment opportunities. It would be inappropriate to decide this issue without further development of the facts, including all the information that was before the board.

Plaintiff's third count challenging the merits of the board's action cannot stand. Plaintiff contends that the evidence against her was tainted by her supervisor's "deep-seated and irrational animosity towards plaintiff," and that the board's action therefore lacked a rational basis. Plaintiff does not contend that any member of the board was biased or prejudiced against her, and the board heard statements adverse to plaintiff from several persons other than her supervisor. Where there is conflicting evidence, the board's decision regarding the credibility of the persons appearing before it must be given great weight. *See Korman v. United States*, 199 Ct. Cl. 78, 86-87, 462 F. 2d 1382, 1387 (1972). There is nothing inherently unbelievable about the evidence presented against plain-

tiff, and we cannot say that the board acted arbitrarily or capriciously in accepting the government's rather than the plaintiff's version of the facts. Plaintiff is not entitled to a trial *de novo* on her dismissal. On remand the trial judge should limit the proceedings to matters necessary for the disposition of plaintiff's first and second counts.

Accordingly, IT IS ORDERED that defendant's motion for dismissal or summary judgment is denied with respect to Counts I and II, and its motion for summary judgment is granted with respect to Count III. The case is remanded to the Trial Division for further proceedings in accordance with this order.

Defendant's motion for rehearing was denied February 1, 1980.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SUSANNA BAGINSKY, Plaintiff, v. THE UNITED STATES, Defendant.	)	No. 519-78

ORDER

A suggestion for rehearing en banc and a petition for reconsideration having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the suggestion for rehearing en banc and the petition be, and the same are hereby, Denied.

FOR THE COURT:

/s/ _____
Clerk

February 4, 1983
Date

UNITED STATES CLAIMS COURT

SUSANNA BAGINSKY

v. No. 519-78

THE UNITED STATES

O R D E R

Pursuant to the order of the United States Court of Appeals for the Federal Circuit, issued October 4, 1982, IT IS ORDERED that judgment is to be entered in accordance with my report, filed March 5, 1982 recommending a decision to the judges of the United States Court of Claims.

/s/ _____
Louis Spector, Judge

J U D G M E NT

Pursuant to the above and Rule 58, IT IS ORDERED AND ADJUDGED that judgment is entered this date in this case as provided above.

/s/ _____
Frank T. Peartree, Clerk

October 8, 1982

United States Court of Appeals for the Federal Circuit

IN THE MATTER OF CASES)
TRANSFERRED TO THIS COURT)
PURSUANT TO PUBLIC LAW)
97-164, Sec. 403)

Before MARKEY, Chief Judge, FRIEDMAN, RICH, DAVIS, BALDWIN, KASHIWA, BENNETT, MILLER, SMITH and NIES, Circuit Judges.

ORDER

The court having considered the matter of cases pending in the Court of Claims and transferred to this court on 1 October 1982 pursuant to Public Law 97-164, Sec. 403, in each of which cases a decision and opinion had been recommended to the judges of the Court of Claims, IT IS HEREBY ORDERED:

That the United States Claims Court enter and transmit to this court as soon as possible a judgment corresponding to the decision recommended in each such case, which judgment will be deemed to be on appeal to this court.

FOR THE COURT

Howard T. Markey,
Chief Judge

4 October 82
Date

IN THE UNITED STATES COURT OF CLAIMS
Trial Division
No. 519-78

(Filed: December 5, 1980)

SUSANNA BAGINSKY

v.

THE UNITED STATES

MEMORANDUM OF PRETRIAL CONFERENCE

A pretrial conference in the above-captioned case was held in the office of the undersigned at 11:00 a.m., December 4, 1980, as requested by plaintiff's counsel in letter of November 12, 1980. Present were the following:

For Plaintiff:
Robert M. Buchanan, Esq. (From Boston)

For Defendant:
Lawrence S. Smith, Esq.
Fred Conway — Veterans Administration
James Adams — Veterans Administration

Trial Judge:
Louis Spector

Plaintiff described the two remaining issues to be tried, as set forth in the court's opinion of October 19, 1979. He pointed out that if plaintiff prevailed on either of these issues, it would be dispositive of the case. Since the first of these issues, as described in the court's opinion, can be resolved after a short trial with a minimum of testimony and documentary material, whereas the second issue rests on Constitutional grounds and would require a great deal of testimony and documentary evidence, he suggested that the court try the first issue, without prejudice to later trial of the second issue, if necessary. Defendant's counsel did not agree that the second issue be reserved.

The undersigned agrees from a reading of the court's opinion that greater economy can be achieved by trying the first issue in what should be a short trial, not exceeding one or two days. It may not be necessary to try the second more complicated and time-consuming issue. Should it become necessary, however, separate trial will also serve to simplify and expedite disposition of that issue.

The undersigned agrees with defendant's counsel that the issue of liability should in any event be tried separately from the issue of amount, as is customary in these cases. Amount can be much more easily computed by the agency should there be a determination on liability favorable to plaintiff.

Counsel then agreed on a trial date of Monday, February 24, 1981, in Washington, commencing at 10:00 a.m. to permit plaintiff's counsel and his two witnesses to travel from Boston that morning.

/s/ _____
Louis Spector
Trial Judge

UNITED STATES COURT OF CLAIMS

SUSANNA BAGINSKY, Plaintiff,	:	
V.	:	CASE NO. 519-78
UNITED STATES OF AMERICA, Defendant.	:	

FIRST AMENDED PETITION

COUNT I

(Violation of VA Regulations)

Jurisdiction

1. This is an action for reinstatement as a Veterans' Hospital staff physician and for damages due to unlawful severance of employment.

2. Jurisdiction is based upon 28 U.S.C. § 1491.

Parties

3. Plaintiff, Susanna Baginsky, is a Massachusetts citizen and a physician licensed to practice medicine in this state. Plaintiff is a certified pathologist. She is a Fellow of the College of American Pathologists, has acted as a pathology laboratory inspector for the College, and has taught a number of

pathology courses to medical and other students. From April 15, 1973 until May 19, 1975, plaintiff was Chief of Laboratory Services at the Veterans' Hospital located in Brockton, Massachusetts (the "Hospital").

4. Defendant is the United States of America. The following two present or former employees of the United States Veterans' Administration ("VA") are referred to herein:

a. Dr. James E. Baker ("Baker") was the director of the Hospital while plaintiff was employed there.

b. Dr. John F. Conlin ("Conlin") was the Hospital's Chief of Staff while plaintiff was employed there.

Facts

5. Plaintiff was appointed Chief of the Hospital's Laboratory Services in April 1973 and commenced work soon thereafter. Pursuant to 38 U.S.C. § 4106, permanence of this career appointment was conditioned upon successful completion of a three-year probationary period, during which time plaintiff's performance was to be periodically reviewed in accordance with VA regulations.

6. Plaintiff's job responsibilities included staffing and administration of the Hospital's pathology laboratory. In accordance with applicable VA regulations, plaintiff undertook to locate an experienced microbiologist for the laboratory. Based on a resume and another VA official's on-site interview, plaintiff recommended and Conlin authorized the hiring of Early Brooks, a black applicant. Shortly after Brooks reported to work in March 1974, plaintiff realized that he was clearly not a qualified microbiologist. Investigation of Brooks' back-

ground confirmed this fact. Plaintiff then insisted that Brooks be fired. Conlin resisted and openly implied that plaintiff's insistence was racially motivated. While Brooks was finally terminated in May 1974, one day prior to a special visit of the VA's Deputy Regional Medical Director, Conlin's handling of this incident greatly undermined plaintiff's laboratory administration.

7. On or about April 15, 1974, Conlin prepared a "Proficiency Report" evaluating plaintiff's performance during her first year at the Hospital. Plaintiff was given a "satisfactory" score of 52.0, based upon a possible total of 88.0. The minimum "satisfactory" rating is 39.0. Conlin's comments stated that plaintiff's "main difficulty has been with personnel selection and administration." He concluded that

> "Desire for . . . [plaintiff's] retention is contingent upon a substantial improvement in her performance."

Baker concurred in these comments and approved the report. This report was not shown to or discussed with plaintiff. Nonetheless, Conlin falsely noted on the report that its contents had been discussed with plaintiff 90 days prior to April 15, 1974.

8. On February 6, 1975, Baker, acting through his assistant director, requested plaintiff to resign. Plaintiff refused and demanded in writing that any action against her be taken in compliance with VA rating and counseling procedures.

9. On or about February 10, 1975, Conlin prepared a "Special Proficiency Report" evaluating plaintiff's performance from April 15, 1974 through February 10, 1975. Conlin gave plaintiff an "unsatisfactory" rating of 27.5, which was increased to 33.5 upon review by Baker, who approved the report on or about February 20, 1975. Defendant did not show this report to, or discuss it with, plaintiff.

10. On February 13, 1975, Conlin relieved plaintiff of her personnel duties. At approximately the same time, he suspended plaintiff's administrative powers. On February 10, 1975, Conlin presented plaintiff with a list of charges against her. Plaintiff then learned for the first time of the existence of the two proficiency reports described above. Conlin refused to give plaintiff a copy of either report.

11. On or about February 20, 1975, Baker convened a Professional Standards Board (the "Board") of six Hospital physicians to review plaintiff's performance during her probationary period. Plaintiff was informed that she had no right to counsel but that she could appear before the Board or submit a written statement.

12. Plaintiff's attorney wrote to Baker on February 26, 1975 to challenge the validity of the Board's convening, due to defendant's failure to adhere to VA regulations. No response was received to that letter.

13. On March 4, 1975, in response to plaintiff's request, Baker sent plaintiff a copy of the Special Proficiency Report of February 10, 1975.

14. On information and belief: The Board met on March 7 and 11, 1975. Conlin testified at both sessions. The Board also heard testimony from the Hospital laboratory personnel. Plaintiff submitted a lengthy written statement but did not appear.

15. The Board's decision, issued on April 2, 1975, recommended that plaintiff be disqualified. Plaintiff was not notified of that conclusion. A Reviewing Board recommended plaintiff's "separation for failure to qualify and perform satisfactorily during the probationary period." That recommendation was approved by the VA's Deputy Regional Medical Director on May 12, 1975. Baker then gave plaintiff 24 hours' notice (the minimum permissible amount) that she would be terminated on May 19, 1975 and that, as a probationary VA employee, she had no appeal rights.

16. In August 1976, in response to her request under the Freedom of Information Act, plaintiff obtained a copy of the Proficiency Report of April 15, 1974. This was the first time plaintiff had ever seen that document.

17. Plaintiff has not held a full-time position as a pathologist since her dismissal on May 19, 1975. She believes that her Hospital employment record disables her from obtaining another government appointment and seriously impairs her ability to obtain other appropriate private employment.

18. Chapter 6 of the VA Manual, MP-5, Part II and § 6.05 of the Department of Medicine & Surgery Supplement thereto require annual preparation of proficiency reports for VA physicians. Section 6.06 of the Supplement directs thorough counseling of probationary employees. Under § 6.06(d), a satisfactory proficiency rating must be discussed with the employee "as soon as possible. . . ." Under § 6.06(e) and (f), an employee for whom an unsatisfactory rating is contemplated must be counseled no later than 90 days before preparation of the proficiency report. If the deficiencies are not corrected within 30 days to 60 days after counseling, a second counseling conference must be held. After that conference, the supervisor must prepare a memorandum outlining the reasons for the second conference, the deficiencies discussed, and the solutions suggested. The employee must be shown this memorandum, initial one copy, and receive another copy. An unsatisfactory rating is permitted to issue only if insufficient improvement follows the second counseling session.

19. The Manual and the Supplement required that plaintiff be counseled and rated by Conlin and that his findings be approved by Baker.

20. Conlin failed to counsel plaintiff in accordance with the Manual and with Supplement § 6.06 and thereby deprived plaintiff of the opportunities to cure any deficiencies in the performance of her duties, to retain her post as Chief, Laboratory Services, and to advance within the VA.

21. The counseling procedures outlined in the Manual and the Supplement were intended to confer important procedural benefits upon plaintiff, who was clearly prejudiced by defendant's departure from such procedures.

22. Pursuant to § 9.03(2)(a) of the Supplement, the Chief Medical Director — and not his deputy — must approve separations such as plaintiff's. Approval of plaintiff's separation by the deputy medical director instead of by the chief medical director deprived plaintiff of another significant procedural benefit which VA regulations intended to accord her.

COUNT II

(Denial of Due Process)

23. Plaintiff repeats and realleges ¶¶ 1-22.

24. The Proficiency Report of April 15, 1974 was derogatory to plaintiff in many respects. The Special Proficiency Report of February 10, 1975 gave low ratings to plaintiff's integrity, emotional stability, dependability, work planning and reporting abilities, and to her capability to handle, elicit cooperation from, and supervise groups. The Reviewing Board's recommendation of plaintiff's severance cited her failure to qualify or to perform satisfactorily.

25. Plaintiff believes that these documents or their comments and conclusions will be made available to or summarized for any prospective employer to whom she applies for a job. Plaintiff therefore believes that defendant's actions, as described above, have placed at stake her good name, her professional reputation, honor, and integrity, and have so stigmatized plaintiff as to foreclose her freedom to find other appropriate employment, despite her diligent search therefor.

26. Apart from the list of charges presented to her by Conlin on February 20, 1975 and from the Special Proficiency

Report of February 10, 1975, plaintiff was not provided with any other materials to be considered by the Board. The written statement which plaintiff submitted to the Board was of necessity directed only to the documents which had been furnished to her.

27. The Board considered other materials in addition to those which had been furnished to plaintiff. Among those materials were the following:

a. Personnel Officer's March 11, 1975 written statement.

b. Lionel Semiao's five-page written statement.

c. Administrative Assistant Richard M. Simon's four-page written statement.

d. Conlin's fourteen-page March 12, 1975 written statement.

None of these materials was furnished to plaintiff. Plaintiff was not aware of them and had no opportunity to respond thereto.

28. The Board was also presented with evidence of additional charges of which plaintiff had not been notified and as to which she was given no opportunity to respond. Among those other charges were the following:

a. That plaintiff was prejudiced against minorities and discriminated against Early Brooks, who was a black Hospital employee.

b. That plaintiff had a "very unusual" relationship with her female secretary.

c. That plaintiff, rather than the Hospital's Personnel Department, was responsible for, and had egregiously erred in, the hiring of Early Brooks without adequate documentation of his credentials.

d. That plaintiff had erroneously misdiagnosed a case of malignant lung cancer as burned-out tuberculosis lesions.

All of these charges were highly prejudicial, and all of them were false.

29. On information and belief: In arriving at its decision to recommend plaintiff's disqualification, the Board was influenced by and relied upon the materials and charges alleged in ¶¶ 27 and 28 above. These matters similarly were part of the record before both the Reviewing Board which confirmed the Board's recommendation and the Deputy Regional Medical Director who approved that recommendation.

30. In addition, plaintiff is informed and believes that her entire Board file would be disclosed to any other VA hospital with which plaintiff might seek employment. Moreover, non-VA hospitals to which plaintiff applies for employment are likely to request plaintiff's authorization to view her entire Board records and would probably not consider plaintiff's application unless such authorization were given. This would mean that any such hospital would see materials relative to charges unknown to plaintiff and therefore undisputed by her.

31. Disclosure of plaintiff's entire Board record, with the false and unrebutted information contained therein, would seriously stigmatize plaintiff and diminish her employment opportunities. As a result, plaintiff is in effect precluded from applying for any hospital positions. Because of the highly specialized nature of plaintiff's training, hospitals would normally account for the largest portion of the jobs available to plaintiff.

32. Defendant's failure to provide plaintiff with all materials considered by the Board and on appeal violated the Due Process Clause of the Fifth Amendment to the United States Constitution. Defendant's failure to apprise plaintiff of all

charges made against her and to give her an opportunity to rebut those charges constituted a further violation of the Due Process Clause.

33. These violations have substantially foreclosed plaintiff from finding further employment suitable to a pathologist of her background and training.

COUNT III

(Arbitrary and Irrational Agency Action)

34. Plaintiff repeats and realleges ¶¶ 1-33.

35. Plaintiff was precluded from proper performance of her duties at the Hospital by Conlin's unremitting harassment of her. On information and belief, plaintiff's discharge was motivated by Baker's and Conlin's active dislike of and malice towards her.

36. There was no substantial or rational basis for plaintiff's discharge.

WHEREFORE, plaintiff respectfully requests that the Court

1. Declare that plaintiff's dismissal from her position as Chief of Laboratory Services at the Brockton VA Hospital was unlawful, due to defendant's failure to comply with applicable VA regulations, was in violation of her constitutional right to receive due process of law, and constituted arbitrary and unreasonable agency action;

2. Vacate plaintiff's dismissal and order plaintiff reinstated as Chief of Laboratory Services at the Brockton VA Hospital;

3. Award plaintiff monetary damages equal to the compensation she would have received had she not been terminated, plus legal interest thereon;

4. Order defendant to vacate, void, and destroy the Special Proficiency Report of February 10, 1975 and the report and recommendations of the Professional Standards Board and the reviewing board;

5. Order defendant to expunge from its records any mention of and all documents relating to either the Special Proficiency Report or the proceedings, recommendations, or review of the Professional Standards Board convened on February 20, 1975.

6. Order that any future proceedings against plaintiff comply with all applicable VA regulations; and

7. Award such further relief as the Court deems appropriate.

June 4, 1979

/s/ _____

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SULLIVAN & WORCESTER
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(617/338-2861)
Attorney for plaintiff

Of counsel:

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No. 83-3

In the Supreme Court of the United States

OCTOBER TERM, 1983

SUSANNA M. BAGINSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-3

SUSANNA M. BAGINSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision of the court of appeals, that her discharge was in compliance with Veterans Administration ("VA") regulations, on the grounds that the court erred by misapplying the "clearly erroneous" standard to findings of the trial court and by making its own findings on petitioner's claim instead of remanding the issue to the Claims Court.

1. Petitioner is a physician who specializes in pathology. On April 15, 1973, petitioner began work under a three-year probationary appointment as Chief of Laboratory Services at the Brockton, Massachusetts Veterans Administration Hospital (Pet. App. 3a). By all accounts, petitioner experienced substantial problems in running the laboratory. There were serious morale problems among employees and the laboratory's accreditation was in jeopardy (*id.* at 3a, 25a).

Regulations governing probationary employees at the hospital required the Chief of Staff, Dr. John F. Conlin, to prepare an annual proficiency report, which he prepared for petitioner on April 15, 1974 (Pet. App. 5a). In his report, Dr. Conlin gave petitioner a "satisfactory," but very low, rating and expressed his opinion that the laboratory was not running smoothly and that her " 'retention is contingent upon a substantial improvement in her performance' " (*ibid.*). On April 22, Dr. Conlin met with petitioner regarding her work record, but the details of that conversation were disputed (*ibid.*).

During 1974, petitioner continued to have difficulty administering the hospital's laboratory services. On November 15, Dr. Conlin prepared a second report, which again discussed petitioner's inadequate performance. Three days later, Dr. Conlin met with petitioner and mentioned a number of areas in which her performance was deficient. Pet. App. 6a. On February 10, 1975, he prepared a special proficiency report, which again criticized petitioner's job performance (*id.* at 7a). Finally, the Hospital's Professional Standards Board convened to consider whether petitioner was qualified and, after considering oral and written statements from various VA hospital employees, the Board recommended petitioner's dismissal on grounds that her performance was unsatisfactory. Petitioner was discharged on May 19, 1975 (*ibid.*).

2. Petitioner filed suit against the United States initially in the United States District Court for the District of Massachusetts, but the action was transferred to the Court of Claims. Her amended petition contained three counts: Count I alleged that the VA had failed to follow its regulations requiring counselling prior to discharge (Pet. App. 89a-94a); Count II alleged a deprivation of due process because the Professional Standards Board considered material not made available to petitioner (*id.* at 94a-97a); and

Count III asserted that the discharge lacked a rational basis (*id.* at 97a-98a). On the government's motion, the Court of Claims dismissed Count III, but remanded Counts I and II to the trial division, inter alia, " 'to determine whether [petitioner had been] shown her proficiency report dated April 15, 1974 at that time or given counselling as the Manual requires" (*id.* at 8a).

On remand, the court decided to try Count I separately. It found for petitioner and ordered her reinstated (Pet. App. 19a-77a). The court held that the VA had violated its regulations in connection with the April 1974 proficiency report (*id.* at 9a), which the court concluded was the only issue to be decided under the Court of Claims remand order.

The court of appeals[1] reversed (Pet. App. 1a-18a). The court held that the trial division had unduly limited the issue on remand by considering whether counselling had been given *only* in connection with the April 1974 proficiency report (Pet. App. 9a). The court of appeals found that the remand had "contemplated a full review of the broader issue whether, prior to her discharge, [petitioner] had been given the counseling the Manual required" (*id.* at 10a).

Instead of vacating the reinstatement order and remanding the case for reconsideration in light of the broader issue posed, the court of appeals chose to "decide the counseling issue" because "the record leaves no question as to the decision that must result from a remand" (Pet. App. 10a). The court of appeals found that, although the VA had not shown petitioner her 1974 proficiency report or counselled her with regard specifically to that report, petitioner had received counselling on at least two occasions prior to the

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[1]The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 *et seq.*, established the United States Court of Appeals for the Federal Circuit. See *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 22 n.33.

preparation of the special proficiency report in 1975 (*id.* at 14a). Moreover, the court found that on numerous occasions petitioner had been informed of her inadequacies as Chief of Laboratory Services, but had been unable to improve her performance (*ibid.*). Accordingly, the court of appeals held that petitioner's discharge was not barred by the VA's failure to comply with its regulations in 1974 (*id.* at 15a). The court remanded to the Claims Court for trial with regard to petitioner's claim that her discharge violated due process (*ibid.*).[2]

3. Petitioner argues (Pet. 14-21) that the court of appeals misapplied the clearly erroneous standard under Fed. R. Civ. P. 52(a) when it reversed the "finding" that earlier violations of the VA's regulations in connection with the April 1974 proficiency report tainted her discharge in 1975 (Pet. 18). The decision below, however, was not subject to the clearly erroneous standard in Rule 52(a). The "causation" issue had been decided by the trial division under an erroneous view of the law; its analysis assumed that the Court of Claims had already held that any violations regarding the 1974 proficiency report undermined the VA's discharge of petitioner. The court of appeals unanimously concluded that this was a misreading of the prior remand order and thus that it was appropriate to set aside the trial division's findings because they necessarily ignored certain important facts. The decision to vacate the reinstatement order, which was based solely on the court's reading of the Court of Claims' earlier remand order, obviously does not warrant review by this Court.

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[2]Judge Kashiwa dissented in part (Pet. App. 16a-18a). He agreed that the judgment should be vacated, because the trial division had misinterpreted the remand order and thus improperly limited the issue on Count I. However, Judge Kashiwa would have remanded the issue of whether the later counselling had been adequate to satisfy the regulations.

Second, petitioner argues (Pet. 21-28) that after the court of appeals held that the trial division had committed legal error, it was required to remand Count I to the trial division for further findings. But it is elementary that where, as here, a remand would serve no purpose, an appellate court need not order one. As this Court held in *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982) (emphasis added), "where findings are infirm because of an erroneous view of the law, a remand is the proper course *unless the record permits only one resolution of the factual issue.*" The court of appeals found that the undisputed record supported the conclusion that Dr. Conlin counselled petitioner twice prior to the February 1975 report and that petitioner repeatedly had been given notice of her deficiencies throughout her appointment (Pet. App. 12a). Accordingly, the court of appeals correctly concluded that on remand the Claims Court could only have found that petitioner had received the counselling required by the regulations prior to her discharge. Review of that factbound determination by this Court is unwarranted.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1983

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[3]Review of petitioner's claim in its present interlocutory posture is particularly inappropriate. The court of appeals remanded the case to the Claims Court to consider petitioner's alternative claim that her discharge violated due process. If petitioner prevails on remand, she will receive reinstatement with back pay. If petitioner does not prevail on remand, she can still seek review in this Court after the final disposition of her case.

DOJ-1983-10

No. 83-3.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

SUSANNA BAGINSKY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petitioner's Reply to Memorandum for the United States in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

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Table of Authorities Cited.

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In her petition for a writ of certiorari, Dr. Susanna Baginsky claims that the United States Court of Appeals for the Federal Circuit erred in setting aside the trial court's finding that her

1975 termination was causally linked to the complete failure to counsel her with respect to the April 1974 proficiency report. Petitioner also argues that the court of appeals erred in making its own fact findings on issues as to which the trial court had made no findings and had not fully developed a record.

The United States seeks to justify this invasion of the trial court's fact finding role on two bases: first, the trial court committed legal error and hence its findings are entitled to no deference. Second, no purpose would be served by remand to the trial court for further fact findings since only one result was possible. Neither assertion excuses the failure of the court of appeals to adhere to this Court's teachings in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), and other cases.

The government contends that the trial court's finding of "causation" is entitled to no deference since "its analysis assumed that the Court of Claims had already held that any violations regarding the 1974 proficiency report undermined the VA's discharge of petitioner." Memorandum in Opposition at 4. This argument suggest that the trial court's finding was based upon an isolated or technical violation. To the contrary, the trial court found that the Veterans Administration failed to follow its regulations "in any material respect" (A. 49a). There is no suggestion by the court of appeals that this finding is erroneous; nor does the government so contend. Given the correctness of that finding, it was incumbent upon the court of appeals, once it decided that the trial court should have addressed the post-April 1974 events, to remand to the trial court to determine whether those events somehow removed the taint of the wholesale violations of Veterans Administration regulations.

The court of appeals dismissed the prior finding of the three judge panel of the Court of Claims that there was a "sufficient relationship" between the failure to counsel and the termination to sustain petitioner's claim, stating that the earlier review was based upon an incomplete record. Similarly, the court of

appeals dismissed the finding of the trial court that there was a causal relationship between the 1974 failure-to-counsel and the 1975 discharge because it felt the trial court misinterpreted the remand from the first review by the three judge panel of the Court of Claims. The trial court focused upon whether Dr. Baginsky had been shown the April 1974 report or had been counseled with respect to it. The court of appeals stated that the trial court should have reviewed the entire time period, through the 1975 termination.

Instead of remanding, the court of appeals set aside the finding of the trial court that there was a causal link between the failure to counsel and the termination and made its own findings. That action ignored important findings of the trial court which are not clearly erroneous. The trial court, having found that the Veterans Administration failed to adhere to its regulations in any respect, went on to find facts which buttressed the earlier ruling of the three judge panel of the Court of Claims that petitioner's 1975 termination was tainted by the procedural deficiencies in connection with the 1974 proficiency report (A. 81a). The trial court found that most of the reasons raised by the Veterans Administration in connection with the termination stemmed from incidents covered in the April 1974 proficiency report about which Dr. Baginsky was not informed or counseled. The "Proposed Separation," submitted by the hospital's director to the Veterans Administration central office in November 1974 (seven months after the defective report), largely tracked the April 1974 complaints (A. 68a). (In its Memorandum in Opposition at 2, the government refers to this Proposed Separation as a "second report," apparently suggesting it was another proficiency report. That is erroneous. The proposed separation was the first step taken by Dr. Baginsky's superiors to initiate her discharge.) These findings strongly suggest that had there been a remand from the court

of appeals to the trial court, it would have found for the petitioner.

The United States contends, Memorandum in Opposition at 5, that remand is unnecessary where the record permits only one resolution of the factual issue. It furthermore suggests that this Court should not concern itself with such a "fact-bound determination." *Id.* Again, the government is incorrect. This is not a situation in which the trial court had made fact findings on all issues in the case, such that the court of appeals could reach its own conclusion. The trial court did not address the post-April 1974 events, except to the extent they bore a relation to the April 1974 proficiency report. Indeed, the trial court considered the post-April 1974 events "not directly relevant to the issue here on remand" (A. 68a).

Instead of remanding, the court of appeals examined the record on its own. It found two instances after April 1974 which it considered to be counseling. The trial court had made no finding as to the nature of those two conversations, since the parties at trial did not fully address the issue of the post-April 1974 events (A. 22a). If the case is remanded under the appropriate legal standard, petitioner will prove that those two "instances" were in no way counseling sessions. That issue was never resolved by the trial court, which is in the best position to resolve such factual issues. Instead the court of appeals resolved the factual issue as to whether there were counseling sessions.

Based upon these two conversations, as to which the trial court made no findings, the court of appeals implicitly reversed the prior finding of causation. Such a course is improper where the trial court made no findings on whether the post-April 1974 events attenuated the procedural irregularities. The "fact finding" by the court of appeals does not answer the question whether the failure of the Veterans Administration to follow its own regulations led to her termina-

tion. If the regulatory violations did lead to her firing, then the "fact" of two counseling sessions cannot remedy the situation. The question which should have been answered, but was not, is whether the wholesale regulatory violations tainted the dismissal. That is a question which the first decision by the three judge panel of the Court of Claims recognized, even though it also recognized that the 1975 termination was apparently conducted in compliance with applicable regulations (A. 81a). The trial court answered the question but was reversed for not considering the post-April 1974 events. The court of appeals addressed the post-April events as if it were the trier of fact, but then did not address the question of whether the 1974 regulatory violations tainted the termination. Petitioner is entitled to a ruling, by the trial court in the first instance, on that question. While it may have been proper for the former Court of Claims to have made such findings in the first instance, a court of appeals cannot do so.

The causation issue is *not* a question which is capable of answering in only one way. The trial court's findings suggest that on remand it would have found for Dr. Baginsky, since the reasons proffered for her termination stem in large part from events prior to April 1974. This Court has recognized the unique ability of trial courts to resolve issues such as causation and intent. *Commissioner* v. *Duberstein*, 363 U.S. 278, 289 (1960). Indeed, in similar circumstances, the court in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), squarely held that a district court's finding as to intentional race discrimination can only be reversed if clear error is shown.

The government's final contention, that the Court should not review this matter in its "present interlocutory posture," Memorandum in Opposition at 5 n.3, is without merit. Pursuant to the direction of the court of appeals, the Claims Court entered final judgment in this case on October 8, 1982 (A. 85a-86a). The appeal to the Federal Circuit was from that

judgment. In no sense then is this case in an interlocutory posture. Unless this Court reviews the ruling of the court of appeals on count one now, plaintiff's rights will be lost.

Respectfully submitted,

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